(7)

No. 95-266-CFX
Status: GRANTED

Docketed:
August 10, 1995

Title: Carrie Jaffee, Special Administrator for Ricky Allen Sr., Deceased, Petitioner
v.
Marylu Redmond, et al.

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Flaxman,Kenneth N.

Counsel for respondent: Rogus,Gregory E.

Ptn due & mld 8-10-95, see ml label re dkt dt.
Confirmed USAP7 docket number with counsel 8/16/95.

Entry	Date	Note	Proceedings and Orders
1	Aug 10 1995	G	Petition for writ of certiorari filed.
2	Sep 15 1995		Brief of respondents MaryLu Redmond, et al. in opposition filed.
3	Sep 20 1995		DISTRIBUTED. October 6, 1995 (Page 14)
5	Oct 10 1995		REDISTRIBUTED. October 13, 1995 (Page 13)
6	Oct 16 1995		Petition GRANTED. ***
7	Nov 30 1995		Joint appendix filed.
8	Nov 30 1995		Brief of petitioner Carrie Jaffee filed.
9	Dec 14 1995		SET FOR ARGUMENT MONDAY, FEBRUARY 26, 1996. (1ST CASE).
10	Dec 19 1995		CIRCULATED.
14	Dec 29 1995	X	Brief amici curiae of American Psychiatric Association, et al. filed.
16	Dec 29 1995	X	Brief amici curiae of George R. Ceasar, et al. filed.
11	Jan 2 1996	X	Brief amici curiae of National Association of Social Workers, et al. filed.
12	Jan 2 1996	X	Brief amicus curiae of American Psychological Association filed.
13	Jan 2 1996	X	Brief amicus curiae of American Counseling Association filed.
15	Jan 2 1996	X	Brief amicus curiae of National Association of Police Organizations, Inc. filed.
17	Jan 2 1996	X	Brief amicus curiae of Employee Assistance Professionals Association, Inc. filed.
18	Jan 2 1996	X	Brief amici curiae of American Psychoanalytic Association, et al. filed.
19	Jan 2 1996	X	Brief amicus curiae of International Union of Police Associations, AFL-CIO filed.
20	Jan 2 1996	X	Brief amici curiae of National Network to End Domestic Violence, et al. filed.
21	Jan 2 1996	X	Brief amici curiae of American Civil Liberties Union, et al. filed.
22	Jan 2 1996	X	Brief amicus curiae of American Association of State Social Work Boards filed.
23	Jan 2 1996	X	Brief of respondents Mary Lu Redmond, et al. filed.
25	Jan 2 1996	X	Brief amicus curiae of United States filed.
29	Jan 2 1996	X	Brief amicus curiae of Menninger Foundation filed.
26	Jan 10 1996	G	Motion of the Solicitor General for leave to participate

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Entry	Date	Note	Proceedings and Orders
			in oral argument as amicus curiae and for divided argument filed.
28	Jan 22 1996		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
31	Jan 30 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Seventh Circuit.
32	Feb 2 1996	X	Reply brief of petitioner filed.
33	Feb 8 1996		Record filed.
		*	Original record proceedings United States District Court for the Northern District of Illinois. (BOX)
34	Feb 20 1996		LODGING by petitioners. One copy of miscellaneous regulations of the Employee Assistance Regulations of the Bureau of Alcohol, Tobacco and Firearms and the Drug Enforcement Administration.
35	Feb 20 1996		LODGING consisting of regulations from agencies reference in reply brief submitted by counsel for the petitioner.
36	Feb 26 1996		ARGUED.

Supreme Court, U.S.
FILED

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95-266 AUG 10 1995

No. 95-____ OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr.

Petitioners,

v.

MARYLU REDMOND Hoffman Estates Police Officer
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Should this Court resolve the conflict between the circuits about the existence of a psychotherapist privilege under Rule 501 of the Federal Rules of Evidence?

2. Assuming that a psychotherapist privilege is recognized under Rule 501, should this privilege extend beyond psychiatrists and clinical psychologists, as contemplated in Proposed Rule of Evidence 504, and instead apply to any "mental health care provider?"

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No. 95-____

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CARRIE JAFFEE, as Special Administrator
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Carrie Jaffee, as Special Administrator for the Estate of Rickie Allen, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 6, 1995.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-24) is reported at 51 F.3d 1346. The rulings of the district court (App. 27-34, 35-40, 41-50, 51-59, 60-64, 65-66) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 25) was entered on April 6, 1995; petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied on May 12, 1995. (App. 26.)

RULE INVOLVED

This case involves Rule 501 of the Federal Rules of Evidence:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state or political subdivision thereof shall be determined in accordance with state law.

STATEMENT

In 1991, petitioner filed a lawsuit under 42 U.S.C. §1983 seeking damages for the death of her son, Rickie Allen, who had been killed by respondent MaryLu Redmond, a police officer employed by respondent Hoffman Estates, Illinois.

Redmond had shot Allen while responding to a "fight in progress" call. According to Redmond, she shot Allen as he was chasing and about to strike another man with a knife. A knife was recovered near Allen's body; Redmond identified the knife as the weapon she had seen in Allen's hand.

Petitioner presented evidence at trial that Allen was unarmed and not threatening another when Redmond shot him. A paramedic who came on the scene shortly after the shooting and who removed Allen's body from the scene, testified that he had not seen a knife. (Tr. 590.) One of the first police personnel on the scene, a trainee, testified that he heard voices in the crowd yelling "They're moving the knife." (Tr. 234.) The first police officer to arrive at the scene after the shooting stated on cross-examination that he saw the knife on Allen's left side (Tr. 456); respondent Redmond testified that the knife was on Allen's right side. (Tr. 387.) Several of petitioner's witnesses testified that they saw a police officer planting a knife. (Tr. 120; Tr. 186, Tr. 267-68.)

The jury returned a verdict in favor of petitioner, awarding forty five thousand dollars on her civil rights claim and five hundred thousand dollars on her state wrongful death claim.

The Privilege Rulings

In the course of pre-trial discovery, petitioner learned that immediately after the incident, respondent Redmond had discussed the shooting with Karen Beyer, a social worker employed by respondent Hoffman Estates. When petitioner sought discovery from the social worker, respondent asked the district court to preclude such discovery, asserting that all conversations with the social worker were shielded by a psychotherapist-privilege.

On consideration of respondent Redmond's motion to quash, the district court held that the privilege issue was governed by federal, rather than state law. (Pet.App. 27-29.) The district judge relied on Proposed Rule of Evidence 504, discussed *infra* at 7 n.2, and held that statements made to a social worker were not privileged. (Pet.App. 30.) The district court did, however, restrict to "counsel's eyes only" disclosure of information to be obtained from the social worker. (Pet.App. 31.)

In subsequent rulings, the district judge stated that he was only authorizing inquiry into discussions with the social worker that were "fact-oriented — that is, having to do with [the] description of the episode, recollections of the episode." (Pet.App. 36.) The trial judge authorized a "narrow inquiry." (Pet.App. 47.) Petitioner could inquire about the "subject matter" of conversations between respondent and the social-worker, but could not ask about conversations that were not directly relevant to the lawsuit. (Pet.App. 57.) The trial judge also held that petitioner's attorneys were entitled to review the notes made by the social worker "which relate to the subject matter" of conversations. (Pet.App. 58.) The district judge stated that he was not permitting "open season" (Pet.App. 57) and required that the deposition of respondent Redmond be supervised by a magistrate judge. (Pet.App. 38-39.)

In response to the district court's orders, respondent Redmond stated that she was unable to recall the contents of any of her numerous discussions about the shooting with the social worker. (Pet. App. 51.) The social worker refused to produce her records without respondent Redmond's authorization. (Pet.App. 61) Respondent refused to provide this authorization (id.) and, as a sanction, the district judge indicated that he would preclude Redmond from testifying at trial "as to her version of the event in which she shot Ricky Allen." (Pet.App. 62.)

On the eve of trial, the district court reconsidered, permitting Redmond to testify but holding that the jury would be instructed about an adverse inference flowing from the non-production of the counseling records.[1] At trial, petitioner impeached Redmond with her inability to recall conversations about the shooting with the social worker. (Tr. 338-343.) Petitioner elicited testimony from the social worker that at one point in therapy, respondent could not recall pulling the trigger (Tr. 352), but that respondent was able to remember this event after 50 therapy sessions. (Tr. 353.) After respondents refused to produce the counselling records (Tr. 356), the district court instructed the jury on a negative inference, (Pet.App. 67), and the jury returned a verdict in favor of petitioner.

Ruling on Appeal

On respondents' appeal, the Seventh Circuit held that the district court had erred in requiring disclosure of any of the conversations between respondent and the social worker. The court of appeals recognized the conflict between the circuits on the existence of a psychotherapist privilege (Pet.App. 16-17), and held that a broad psychotherapist privilege would "encourage troubled individuals . . . to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors." (Pet.App. 18.) The Seventh Circuit concluded that the privilege should extend beyond psychiatrists and psychologists and apply to all "mental health care providers as well, including licensed clinical social workers." (Pet.App. 22 n.19.)

In the view of the Court of Appeals, the inquiry permitted by the district court into the subject matter of conversations with the social worker could only have resulted in cumulative evidence (Pet.App. 23) and involved "confidential communications" that were protected from disclosure. (Pet.App. 23.) On this basis, the Seventh Circuit reversed the jury verdict and remanded for a new trial.

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[1] The district court found that the records were the property of respondent Village of Hoffman Estates. (Pet.App. 61.)

REASONS FOR GRANTING THE WRIT

This case raises important and recurring questions involving the existence and scope of a psychotherapist privilege in federal cases.

In adopting the Federal Rules of Evidence, Congress declined to adopt the psychotherapist-client privilege that had been proposed as Rule 504,[2] but adopted Rule 501, which permits the federal courts to look to "reason and experience" in considering claims of privilege not recognized at common law.

In its decision in this case, the Seventh Circuit, acknowledging a conflict among the circuits (App. 16), recognized a "psychotherapist privilege" applicable to all "mental health care providers." (App. 22 n.19.) The privilege, as fashioned by the Seventh Circuit, shields from disclosure everything that respondent Redmond told a social worker after killing petitioner's decedent Rickie Allen. (App. 23.)

The Court of Appeals for the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have refused to recognize any psychotherapist privilege. *Slakan v. Porter,* 737 F.2d 368 (4th Cir. 1989); *United States v. Moore,* 970 F.2d 48 (5th Cir. 1992); *In re Grand Jury Proceedings,* 867 F.2d 562 (9th Cir. 1989); *United States v. Burtrum,* 17 F.3d 1299 (10th Cir. 1994); *Hancock v. Hobbs,* 967 F.2d 462 (11th Cir. 1992);

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[2] Proposed Rule 504 would have created a privilege for communications with a "psychotherapist," defined as "(A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition . . . or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged."

The Second and Sixth Circuits have each recognized a psychiatrist-patient privilege. *In re Zuniga,* 714 F.2d 632, 637 (6th Cir. 1983); *In re Doe,* 964 F.2d 1325 (1992). The Sixth Circuit described its privilege as protecting the patient's "innermost thoughts," 714 F.2d at 640, and not shielding from disclosure the patient's name, or the fact and time of treatment. The Second Circuit recognized the privilege in a case seeking production of a witness' psychiatric history, 964 F.2d at 1328, and views the privilege as "a requirement that a court give consideration to a witness' privacy interests as an important factor to be weighed in the balance in considering the admissibility of psychiatric histories or diagnoses." Id. at 1329.

The broad privilege recognized by the Seventh Circuit in this case impedes petitioner's ability to prove her case. Petitioner sought to show that respondent Redmond made statements to the social worker about the shooting that were contrary to the version Redmond offered to the jury. Under the decision of the court of appeals in this case, anything that Redmond told the social worker — even an outright confession — is shielded from disclosure by the "mental health care provider" privilege.[3]

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[3] At trial, Redmond stated that she was unable to recall the contents of her discussions with the social worker. (Tr. 338-343.) The social worker testified that at one point in therapy, respondent could not recall pulling the trigger (Tr. 352), but that she was able to remember this event after 50 therapy sessions. (Tr. 353.)

This Court has taken a cautious approach to expansion of common law privileges. See, e.g., *Trammel v. United States,* 445 U.S. 40 (1980); *United States v. Gillock,* 445 U.S. 360, 367-68 (1980); *University of Pennsylvania v. EEOC,* 493 U.S. 182 (1990). This approach has been followed by the five circuits which have refused to recognize any psychotherapist-client privilege, but was disregarded by the Seventh Circuit in this case.

The Seventh Circuit justified its adoption of a "mental health care provider" privilege by concluding that the privilege was required "to assist mental health professionals to succeed in their endeavors." (Pet.App. 18.) The empirical evidence, though is to the contrary:

> The presence or absence of an absolute psychotherapist-patient privilege actually has little impact upon a patient's willingness to reveal personal thoughts to a psychotherapist.
>
> Were the law purged of the psychotherapist-patient privilege, there would be little if any impact on treatment outcomes.
>
> J. Klotz, *Limiting the Psychotherapist-Patient Privilege: The Therapeutic Potential,* 27 Crim.Law.Bull 416, 417 (1991).

The question of whether there should be a "psychotherapist-client" privilege under Rule 501, and whether it should extend beyond psychiatrists and psychologists is a question that has received conflicting answers from the courts of appeals. Certiorari should be granted to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

August, 1995

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 94-1151

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr. and LECHIA ALLEN,
Next Friend of RICKY ALLEN, JR., and
BRANDON ALLEN,

Plaintiffs-Appellees,

v.

MARY LU REDMOND, Hoffman Estates Police Officer
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 4153—**Milton I. Shadur**, *Judge.*

ARGUED SEPTEMBER 14, 1994—DECIDED APRIL 6, 1995

Before WOOD, GODBOLD* and COFFEY, *Circuit Judges.*

COFFEY, *Circuit Judge.* On June 27, 1991, Police Officer Mary Lu Redmond responded to a reported fight in progress at an apartment complex. When she arrived at the scene, she was advised that there had been a stabbing inside the building. Within minutes thereafter, Officer

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* The Honorable John C. Godbold, of the Eleventh Circuit, is sitting by designation.

Redmond stated that she fired her weapon and killed Ricky Allen, Sr. as he was pursuing and rapidly gaining on another man, and was poised to stab him with a butcher knife. Allen's surviving family members filed suit against Officer Redmond and her employer, the Village of Hoffman Estates, Illinois (the "Village"), alleging that Officer Redmond's use of deadly force violated Allen's rights under the Fourth and Fourteenth Amendments to the United States Constitution, and that Officer Redmond caused Allen's wrongful death under the Illinois Wrongful Death Act, 740 ILCS 180/0.01-2.2 (1994). Redmond and the Village appeal the $545,000 jury verdict. The appellants raise two issues on appeal: first, that the district court erred in instructing the jury on the use of deadly force; and second, that the district court erred by refusing to recognize a privilege for confidential communications between Officer Redmond and the licensed clinical social worker from whom she sought counseling. We affirm as to the first issue and reverse and remand as to the second issue dealing with the question of privilege.

I. BACKGROUND

A. *The Shooting*

On June 27, 1991, Officer Redmond, who was alone on patrol duty in that area on the day shift, responded to a dispatcher's report of a fight in progress at the Grand Canyon Estates apartment complex in the Village of Hoffman Estates, a suburb of Chicago, Illinois. Redmond was the first police officer to arrive at the scene. Officer Redmond testified that, as she pulled into the apartment complex parking lot, she saw two African-American women running toward her car, waving their arms above their heads,[1] one of whom stated that there had been a stabbing inside the building. Redmond relayed this information to her dispatcher and requested assistance and an ambulance.

As Redmond approached the apartment building, five men ran out the front door yelling and screaming. One of the men was waving a pipe above his head. At this time, Officer Redmond testified that she ordered the man carrying the pipe to drop the pipe and also ordered everybody to the ground. After repeating the command "Drop the pipe" several times to no avail, Officer Redmond was forced to draw her service revolver. Almost immediately thereafter, two more men—a Caucasian man followed by an African-American man in hot pursuit—came running out of the door of the building. Officer Redmond testified that the African-American man, later identified as Ricky Allen, Sr., was armed with a butcher knife, was chasing and gaining on the Caucasian man, and was "directly behind" and poised to stab him when she fired the fatal shot. Officer Redmond testified that she commanded Allen to drop the butcher knife several times before firing:

> I ordered the black male subject with the knife to drop the knife several times. I told him to drop the knife and get on the ground. . . . I was yelling at him to drop the knife and get on the ground. . . . [H]e did not drop the knife and he did not get on the ground. . . . [I yelled] at least three times. I just kept yelling the minute I saw him.

Officer Redmond explained the moment before the shooting as follows:

> As [Allen] was gaining speed on the first subject until they were directly—he was directly in front of him, like the first subject's back, and then the second subject, as he was gaining on him the second subject, the male black subject with the knife took the knife back, raised it above his head and I waited, and as he started to come down with the knife and made the downward motion, I fired one shot at him.

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[1] The two women waving their arms were Ricky Allen, Sr.'s sisters, Connie Allen and Sharon Allen.

Redmond testified that she "didn't even have time to square up,"[2] when she fired her weapon "[b]ecause the second subject was about to kill the first subject with the knife." She noted that only three or four seconds elapsed from the time Allen emerged from the apartment building door until the time she fired. Four of Allen's brothers and sisters, all of whom witnessed the shooting, testified that Allen was unarmed when Officer Redmond fired her weapon.

Officer Redmond testified that after she fired the single shot at Ricky Allen, Sr., he fell to the ground and she ran toward him with her gun at her side. She observed the butcher knife lying on the grass approximately two or three feet from his body. She repeated her request for backup support and an ambulance on her portable radio, as "people came pouring out of the buildings." Redmond stated that several people within the crowd "started to charge" at her, as they were "yelling," "screaming," "swearing" and "quite hysterical." She raised her gun when one person from the crowd came within arm's length, and ordered everyone "to get back, get down, get beyond the sidewalk, get on the ground." In her testimony, Officer Redmond made it clear that no one from the crowd attempted to come to Allen's aid, and that the knife was not moved from the place it landed when Allen fell to the ground until it was retrieved by one of the investigating officers.

Allen's siblings remembered the events just after the shooting differently. Connie Allen, his sister, testified that she attempted to approach her brother's body when Officer Redmond, with her gun raised, ordered her to get back and also stated that Redmond ordered her sister Sharon to step back at gunpoint. Connie Allen did not

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[2] When the officer testified about having had insufficient time to "square up," she was stating that she did not have enough time to assume the proper stance before firing her weapon to ensure the most accurate aim.

observe a knife lying on the grass near her brother's body until after the ambulance had taken the body away. When asked at trial why she had not reported what she had seen to any of the police investigating the shooting, Connie stated that she had not felt like talking to anyone immediately after the shooting.

Officer Joe Graham arrived at the Grand Canyon Estates apartment complex shortly after the shooting. When he arrived, he saw a large crowd of people—approximately twenty-five to thirty African-Americans and five to ten Caucasians—gathered on the grass, and a number of people "rushing out of the apartment buildings—to see what was going on." Officer Graham observed Officer Redmond standing on the lawn, behind Allen's body, with her gun drawn and aimed at the crowd. Officer Graham testified during his deposition that Officer Redmond appeared "somewhat bewildered" when he first arrived at the scene, and later at trial he explained that he meant she was "visibly shaken or upset or disoriented." Officer Graham testified that the members of the crowd were "fluctuating back and forth . . . in a very chaotic movement," yelling that Officer Redmond "had shot Mr. Allen and that she didn't have to shoot him in the head" and that "they were going to sue the white bitch for shooting Mr. Allen." Officer Graham testified that when he knelt down to check for Allen's pulse, he saw a butcher knife lying on the grass approximately an arm's length away from the body.

B. *Officer Redmond's Counseling*

After the shooting, Officer Redmond sought counseling from Karen Beyer, a licensed clinical social worker[3] certi-

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[3] Under Illinois law, a licensed clinical social worker provides "mental health services for the evaluation, treatment, and prevention of mental and emotional disorders . . . based on knowledge and theory of psychosocial development, behavior, psychopathology,

(Footnote continued on following page)

fied by the state of Illinois as an employee assistance counselor and employed by the Village. Officer Redmond met with Beyer for the first time three or four days after the shooting incident and continued counseling for approximately two or three sessions per week through at least January of 1992, six months after the shooting.[4]

During pre-trial discovery, the plaintiffs learned that Officer Redmond had participated in a number of counseling sessions with Beyer, the licensed clinical social worker. At Officer Redmond's deposition, the plaintiffs inquired regarding the substance of her communications with Beyer. Officer Redmond refused to respond to this line of questioning, contending that her communications with a licensed clinical social worker were privileged. The plaintiffs subsequently subpoenaed Beyer to testify at a deposition and to produce her credentials as a counseling professional as

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[3] *continued*

unconscious motivation, interpersonal relationships, and environmental stress." 225 ILCS 20/3 (1994). A licensed clinical social worker is a person "who (1) has a master's or doctoral degree in social work from an accredited graduate school of social work and (2) has at least three years of supervised postmaster's clinical social work practice which shall include the provision of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders." 405 ILCS 5/1-122.1 (1994). An individual cannot obtain a license to practice clinical social work until he or she passes an examination for the practice of clinical social work and has completed either (a) a master's degree in social work and 3,000 hours of satisfactory supervised clinical experience, or (b) a doctoral degree in social work and 2,000 hours of satisfactory supervised clinical experience. 225 ILCS 20/9 (1994). Karen Beyer, the Director of Health and Human Services for the Village, received her master's degree in social work from Loyola University in 1969. At the time of trial, she had had some twelve thousand hours of experience in individual, family, and marital psychotherapy, and had participated in clinical supervision in psychotherapy for doctoral psychology students from several psychology programs.

[4] All of Officer Redmond's conversations with Karen Beyer after June 27, 1991 took place during counseling sessions.

well as all her "notes, records, [and] reports pertaining to Mary Lu Redmond." The defendants, Redmond and the Village, moved to quash the subpoena, maintaining that all of Officer Redmond's communications occurring within the context of the counseling relationship, as well as Karen Beyer's notes and reports pertaining to those communications, were privileged. The trial court denied the defendants' motion to quash, based on the judge's belief that the psychotherapist/patient privilege recognized in other circuits does not extend to a licensed clinical social worker,[5] and ordered Karen Beyer to testify as to "the disclosures made to her by Ms. Redmond of the incidents of the day that relate to [the shooting]." We wish to point out that the Illinois statute specifically grants the psychotherapist/patient privilege to social workers. *See* 740 ILCS 110/2, 110/10 (1994). The court ordered Officer Redmond to appear for a third deposition session to answer questions concerning her communications with Karen

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[5] The judge stated at the hearing on the defendants' motion to quash:

> But my sense has consistently been, when dealing with these problems, that the place to go as the best source is to look at what the Supreme Court's proposals had been and what have now been referred to as the "Standards," although they are not the Federal Rules of Evidence. And when I looked at that I found that Standard 504 is one that adopts a privilege for psychotherapists. Again referring to Weinstein at 504[03] at page 504-17, there is a psychotherapist-patient privilege, and that expressly does not apply to social workers. . . . So where I come out on this one is that someone who is engaging in a kind of counselling to assist someone, maybe over a traumatic experience—someone in the category of Ms. Beyer, who is identified as a licensed clinical social worker and a certified employee assistance counselor—does not stand entitled to privilege under the federal Standard, and that my perception is that the guide to how we should function in these cases, where we are looking at a federal claim as well as a state claim, is that it is the federal standard that ought to control and not the provisions of an Illinois statute that might extend beyond that.

Beyer. Officer Redmond appeared for the third deposition session, and again the answers she gave regarding her counseling sessions with Karen Beyer were evasive and incomplete, obviously an attempt to protect her privileged communications.

When Karen Beyer appeared for her deposition, she limited her answers to only those facts concerning disclosures made by Officer Redmond about the circumstances leading up to the shooting incident on June 27, 1991.[6] Beyer also refused to produce any notes or reports from Officer Redmond's counseling sessions. The plaintiffs filed another motion to compel Karen Beyer to answer certain questions to which objections had been made and to produce all of her notes and reports on Mary Lu Redmond. After Karen Beyer's second deposition session, the plaintiffs filed another motion to compel further responses, and the trial judge responded with an order permitting unrestricted and unlimited inquiry into statements made by Officer Redmond to Karen Beyer during their counseling sessions.[7] At her final deposition session, and again during trial, Officer Redmond responded "I don't recall" to the majority of questions dealing with the substance of her counseling sessions with her therapist and licensed clinical social worker, Ms. Beyer.[8] Ms. Beyer likewise refused to

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[6] Karen Beyer also responded to general questions dealing with her credentials as a licensed clinical social worker and the timing and duration of her meetings with Officer Redmond.

[7] Judge Shadur commented at the hearing on the plaintiffs' motion to compel further discovery as follows:

> [M]y sense of the appropriate sanction, if you want to call it that, is to give the plaintiff access. . . . And that means that as far as I am concerned the bars are pretty well down to the opportunity to have access to Ms. Beyer in terms of what she recalls of those conversations. . . . [A]n unfettered type of examination of Karen Beyer . . . would be an appropriate course of action.

[8] We note that noncompliance with a court's order is justified when the order commands the revelation of privileged information, the disclosure of which would result in irreparable injury. *See In re Novak*, 932 F.2d 1397, 1401 n.7 (11th Cir. 1991).

divulge her communications other than the officer's factual description of the events leading up to the shooting. Karen Beyer did produce three pages of redacted notes.

On April 6, 1993, the district court ordered that Officer Redmond would be barred from testifying at trial as to her version of the shooting incident "because plaintiffs' attorneys have been blocked from effective cross-examination." Just prior to trial, on December 10, 1993, the trial judge reconsidered and vacated this ruling, but made it clear that the jury would be instructed that it could draw an adverse inference from the defendants' failure to produce Karen Beyer's notes and in fact gave such an instruction. At trial, the district judge instructed the jury that the defendants had no legal justification to refuse to produce Karen Beyer's notes of her counseling sessions with Officer Redmond. Over the defendants' objection, the district judge instructed the jury that it was "*entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates.*" (Emphasis added.)[9]

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[9] Jury Instruction No. 8 provided in full that

> You have heard evidence in this case that Karen Beyer, while an employee of the Village of Hoffman Estates, had numerous conversations with Mary Lu Redmond and made notes of those conversations. You have also heard testimony that Ms. Beyer's notes were the property of the Village of Hoffman Estates.
>
> *During the course of this lawsuit the Court ordered the Village of Hoffman Estates to turn over all of Ms. Beyer's notes to plaintiff's attorneys. The Village was provided with numerous opportunities to obey the Court's order and refused to do so. During the course of this lawsuit Mary Lu Redmond also testified that she would not authorize or direct Ms. Beyer to turn over those notes to plaintiff's attorneys.*
>
> During Ms. Beyer's testimony she referred to herself as a *"therapist," although she is not a psychiatrist or psychologist—she is a social worker. This Court has ruled that there is no legal justification in this lawsuit, based as it is on a federal constitutional claim, to refuse to produce Ms. Beyer's*

(Footnote continued on following page)

The trial judge also instructed the jury on the factors it could take into account in determining whether Officer Redmond's use of deadly force was proper. The court gave the plaintiffs' proffered Jury Instruction No. 5, over the defendants' objection, and rejected the defendants' Proposed Jury Instruction No. 7.[10] The defendants' Pro-

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[9] *continued*

> *notes of her conversations with Mary Lu Redmond, and that such refusal was unjustified.*
>
> *Under these circumstances, you are entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates.*

(Emphasis added.)

[10] Jury Instruction No. 5 provided in full that

> Under the circumstances of this case, you may find that Mary Lu Redmond's use of deadly force caused Ricky Allen, Sr. to be deprived of his life without due process of law if and only if the deadly force was not necessary to prevent death or great bodily harm to another person.
>
> In determining whether the deadly force used by Mary Lu Redmond was necessary to prevent death or great bodily harm, you must consider all the facts and circumstances with which Mary Lu Redmond was confronted. For that purpose the reasonableness of Mary Lu Redmond's decision to use deadly force is to be judged from the perspective of a reasonable police officer who was confronted with the circumstances presented to Mary Lu Redmond at the moment the force was used. In other words, the question is whether a reasonable officer in Mary Lu Redmond's place would then have believed that Ricky Allen, Sr. was about to cause death or great bodily harm to another person and that deadly force was necessary to prevent such harm.
>
> What the circumstances are that were presented when Mary Lu Redmond used deadly force has been the subject of conflicting testimony and is for you to decide.

Defendants' Proposed Jury Instruction No. 7 provided in full that

> A police officer's use of force, whether deadly or not, is excessive and violates the constitution only if it is not objectively reasonable. Use of force is objectively reasonable if a reasonable officer on the scene, confronted with the same circum-

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posed Jury Instruction No. 7 included two points omitted from the plaintiffs' Jury Instruction No. 5: first, that the jury should not consider a police officer's subjective intentions or motivations in using deadly force; and second, that the jury should make allowance for the fact that police officers frequently "have to make split second judgments under tense, uncertain, and rapidly evolving circumstances."

The jury returned a verdict in favor of the plaintiffs based on these jury instructions and awarded $45,000 for the federal constitutional claim and $500,000 for the state wrongful death claim. The defendants appeal.

II. DISCUSSION

Officer Redmond and the Village urge reversal on two grounds, arguing that: (1) the district court erred in instructing the jury on the use of deadly force; and (2) the district court erred in refusing to recognize a privilege under Rule 501 of the Federal Rules of Evidence for confidential communications between Officer Redmond and Karen Beyer, the trained and experienced licensed clinical social worker from whom Redmond received counseling. Both of these asserted errors stem from the court's instructions to the jury. On appeal, our review of jury instructions is limited. *Doe v. Burnham*, 6 F.3d 476, 479 (7th Cir. 1993). Jury instructions "must be correct statements of the law that are supported by the evidence." *United States v. Perez*, No. 93-3003, slip op. at 11 (7th Cir. Dec. 22, 1994). We review jury instructions as a whole to determine " 'if the instructions . . . were sufficient to inform the jury correctly of the applicable law.' " *Patel v. Gayes*, 984 F.2d 214, 218-19 (7th Cir. 1993) (quoting *United States v. Villarreal*, 977 F.2d 1077, 1079 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1350 (1993)). Reversal is warranted only if a jury instruction misguided the jury to a litigant's prejudice. *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 725 (7th Cir. 1994).

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[10] *continued*

> stances, could have taken actions similar to those taken by the defendant Mary Lu Redmond.
>
> In determining whether the force used by the defendant is objectively reasonable, you must consider all of the facts and circumstances with which the defendant was confronted, including, but not limited to:
>
> 1. The information available to the defendant at the time of the incident;
> 2. The acts of the plaintiff(s) or plaintiff's decedent; and
> 3. Whether the plaintiff's decedent reasonably appeared to be a threat to the officer or to other persons.
>
> The defendant's subjective intentions or motivations, good or evil, should not be considered in determining whether she acted in an objectively reasonable manner.
>
> The reasonableness of the defendant's conduct is to be considered from the perspective of a reasonable officer at the moment the force was used, and not with the 20/20 vision of hindsight. In other words, you must make allowance for the fact that officers may have to make split second judgments under tense, uncertain, and rapidly evolving circumstances.

We thus undertake a two-part inquiry. "First, we determine whether the instruction misstates or insufficiently states the law. If so, we next determine whether the misstatement or deficiency likely confused or misled the jury causing prejudice to a litigant." *Burnham*, 6 F.3d at 479. We defer to the district court's discretion in formulating the specific wording of the instructions, so long as the instructions as given cover all of the essential points of the applicable law. *United States v. Scott*, 19 F.3d 1238, 1245 (7th Cir.), *cert. denied*, 115 S. Ct. 163 (1994).

A. *Fourth Amendment Deadly Force Jury Instruction*

Officer Redmond and the Village assert that the district court erred in giving Jury Instruction No. 5, and in failing to give Defendants' Proposed Jury Instruction No. 7, both of which addressed the objective reasonableness of Officer Redmond's use of deadly force. *See supra* n.10. The defendants note that the instruction given failed to

explain that a police officer's "subjective intentions or motivations, good or evil, should not be considered in determining whether [the officer] acted in an objectively reasonable manner" or to explain that police officers "may have to make split second judgments under tense, uncertain, and rapidly evolving circumstances." *See Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The defendants contend that these omissions rendered the given instruction insufficient as a matter of law. We disagree.

Excessive force claims, including deadly force claims,[11] resulting from any seizure are analyzed under the Fourth Amendment's objective reasonableness standard. *Jones v. Webb*, No. 94-1270, slip op. at 8 (7th Cir. Jan. 11, 1995); *Ford v. Childers*, 855 F.2d 1271, 1275 (7th Cir. 1988) (*en banc*). The objective reasonableness of a police officer's actions depends upon "the information [the officer] possessed immediately prior to and at the very moment [she] fired the fatal shot." *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988) (*en banc*); *see also Graham*, 490 U.S. at 396 ("[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"). Relevant factors include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. A police officer's subjective intentions are irrelevant; "evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will . . . good intentions make an objectively unreasonable use of force constitutional." *Id.* at 397. Moreover, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97; *see also Sherrod*, 856 F.2d at 805 (determination of propriety of police officer's use of deadly force requires analysis of "the knowledge, facts and circumstances known to the officer at the time [she] exercised [her] split-second judgment as to whether the use of deadly force was warranted").

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[11] We note that a police officer may, without violating the proscription of the Fourth Amendment, use deadly force to stop a suspected felon, if the officer has probable cause to believe that the suspect poses a threat of serious physical injury to *the officer or to another person*. *See Tennessee v. Garner*, 471 U.S. 1, 12, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988) (*en banc*) ("*when an officer believes that a suspect's actions places him, his partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force*") (emphasis in original).

We believe, in part considering our limited review of jury instructions, that the instruction the court gave was adequate. It was objective. The jury was instructed to consider all the facts and circumstances with which Mary Lu Redmond was confronted. This was to be "judged from the perspective of a reasonable police officer who was confronted with the circumstances presented to Mary Lu Redmond at the moment the force was used." It then emphasized whether a "reasonable officer" in her place would have believed "that the force was necessary to prevent the death, etc." We believe that the instruction was adequate and permitted both the parties to argue their theories of the case about times and other circumstances. It could have been amplified, but we need not adopt for an instruction the language various courts use in particular cases.[12]

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[12] Although we do not believe that a more detailed instruction was necessary, we note that the evidence in this case was consistent with the Defendants' Proposed Jury Instruction No. 7. Each of the witnesses to the shooting testified that no more than four or five seconds elapsed from the time Ricky Allen, Sr., carrying

(Footnote continued on following page)

B. *Counseling Privilege*

Officer Redmond requests that we vacate the jury's verdict on the ground that the district court's instructions improperly stated to the jurors that they were permitted to draw an adverse inference from the defendants' failure to disclose information protected by the psychotherapist/patient privilege. The trial court's instruction explicitly allowed the jury to infer that Officer Redmond revealed unfavorable and damaging information to her therapist during her many counseling sessions; the judge told the jury that it was "entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates." Initially, we note that the existence and scope of evidentiary privileges are to be "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501.[13] The Supreme Court has observed that Rule 501 "manifested an affirmative intention not to freeze the law of privilege" but that its purpose was to "'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.'" *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) (citations omitted).

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[12] *continued*

a butcher knife, emerged from the door of the apartment building until the time Officer Redmond fired her weapon. Officer Redmond was forced to make a life or death decision in a matter of seconds as she observed the butcher knife in the hand of the assailant move downward toward the back of his intended victim. Judge Shadur commented that "one of the problems with [defendants' proposed instruction is that] the split second business is . . . so inconsistent with [Officer Redmond's] own testimony." The situation Officer Redmond faced did not become life-threatening until the very moment when she observed Ricky Allen, Sr. project the butcher knife he held raised above his head in a downward motion toward the back of his intended victim. For that matter of seconds before Allen reached the man he was pursuing, Officer Redmond had no time to cogitate, wait or reflect on the question of whether or not to use deadly force. But once Ricky Allen, Sr. came within striking distance of the man he was chasing, Officer Redmond was forced to make a split-second decision to discharge her weapon in an attempt to save the life of Allen's intended victim. The fact that Officer Redmond may have observed Ricky Allen, Sr. chasing another man in a time frame of four or five seconds prior to the fatal moment does not change the instantaneous and split-second nature of the decision she was forced to make.

This is a case of first impression before the Seventh Circuit, questioning the existence of a federal privilege for confidential communications between a licensed clinical social worker and a patient. The Second and Sixth Circuits have determined that "reason and experience" compel the recognition of the psychotherapist/patient privilege in both civil and criminal cases. *In re Doe*, 964 F.2d 1325 (2d Cir. 1992); *In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983). In contrast, the Fifth, Ninth, Tenth, and Eleventh Circuits have rejected the privilege in factual situations not even remotely similar to the one before this court, each interpreting Rule 501 as limiting the development of privileges to those recognized by the common law. *See United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994) (declining to recognize a psychotherapist/patient privilege in criminal child sexual abuse case); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989) (rejecting assertion of a psychotherapist/patient privilege by target of grand jury murder investigation); *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989) (refusing to recognize a psychotherapist/patient privilege in criminal firearms case); *United States v. Meagher*, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976) (rejecting criminal defendant's assertion of psychiatrist/patient privilege in bank robbery trial). With the exception of the Tenth Circuit's decision in *Burtrum*, which involved admissions by a pedophile to his therapist of criminal child sexual assault,[14] the decisions refusing to recognize the psychotherapist/patient privilege are at least five years old. Much has changed with the mental health field in the past five years.[15] The need, and demand, for counseling services has skyrocketed during the past several years due to the rapid spread of violence and crime throughout our nation. Countless innocent bystanders, as well as law enforcement officers themselves, witness violent crimes and homicides.[16] These unfortunate individuals, who in-

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[13] Congress chose not to specifically adopt the psychotherapist/patient privilege proposed for inclusion in the Federal Rules of Evidence, but instead adopted Rule 501, which directs the federal courts to develop privilege rules "in the light of reason and experience" and to be guided by statutes of the respective states providing for the privilege.

[14] Significantly, the district court in *Burtrum* recognized a qualified psychotherapist/patient privilege, but, in applying the balancing test articulated in *In re Doe*, 964 F.2d at 1328, the district court concluded that "the public interest in protecting young children from sexual abuse 'far outweighs the [defendant's] personal privacy interest and the need for informed medical assistance.'" *Burtrum*, 17 F.3d at 1301. The Tenth Circuit, in affirming, held *only* that the psychotherapist/patient privilege would not apply in the criminal child sexual abuse context. *Id.* at 1302. Implicit in this holding is the possibility that the Tenth Circuit would recognize the psychotherapist/patient privilege in a different context.

[15] "The psychological counseling privilege has gained recognition since the 1950s, when psychology and psychotherapy attained professional legitimacy." Developments in the Law—Privileged Communication: Part IV. Medical and Counseling Privileges, 98 Harv. L. Rev. 1530, 1530 (1985) (citing Louisell, The Psychologist in Today's Legal World (pt. 2), 41 Minn. L. Rev. 731, 731-35 (1957)) (hereinafter "Developments in the Law: Part IV").

[16] Although police shootings are not uncommon, we have in recent years seen outbreaks of violence and killings in a wide variety of public settings, including hospitals, schools, post offices, abortion clinics and street corners. A quick glance at newspaper headlines in recent months illustrates the violence and trauma innocent bystanders witness all too often: on January 26, 1995, a gunman opened fire near the University of North Carolina-Chapel Hill campus, killing a student and a bicyclist; on December 30,

(Footnote continued on following page)

clude not only law enforcement personnel, but also students, school and hospital employees, postal workers, and members of the general public, need and deserve the help, support, and emotional release provided by confidential counseling. The recognition of a psychotherapist/patient privilege can only serve to encourage troubled individuals, as well as those who witness, participate in, and are intimately affected by acts of violence in today's stressful, crime ridden, homicidal environment, to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors.

We agree with the Second and Sixth Circuits that reason and experience compel the recognition of a psychotherapist/patient privilege. Reason tells us that psychotherapists and patients share a unique relationship, in which the patient's ability to communicate freely without the fear of public disclosure is the key to successful treatment. *See In re Zuniga*, 714 F.2d at 640 (*"[t]he essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed [to his therapist] without fear of disclosure"* in order that the patient might receive adequate treatment) (emphasis added).

> "The psychiatric patient . . . exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that

> the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand."

In re Zuniga, 714 F.2d at 638 (quoting *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting Guttmacher and Weihofen, Psychiatry and the Law 272 (1952))). Moreover, communications with a psychotherapist often involve highly personal matters, the disclosure of which "would frequently be embarrassing to the point of mortification for the patient." *In re Doe*, 964 F.2d at 1328. Indeed, courts and commentators have focused on an individual's right of privacy, "a fundamental tenet of the American legal tradition," to justify the psychotherapist/patient privilege. *See, e.g.*, Developments in the Law: Part IV, 98 Harv. L. Rev. at 1544-47 ("[c]ompelled disclosure of information communicated by a patient to a psychotherapist will therefore often threaten the privacy of the patient's most intimate thoughts"); *In re Lifschutz*, 2 Cal. 3d 415, 431-32, 85 Cal. Rptr. 829, 839 (1970) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)) ("We believe that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the [state] statute and draws sustenance from our constitutional heritage. . . . [T]he United States Supreme Court declared that 'Various guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone").

> Privacy serves several functions: it allows room for personal autonomy, it permits necessary emotional release, and it promotes free self-evaluation. The privacy rationale, however, regards the privacy of individuals as important not only in fostering these ends, but also as an end in itself. Compelled disclosure is considered inherently wrong because it inflicts two distinct kinds of harm: (1) the embarrassment of having secrets revealed to the public, and (2) the forced breach of an entrusted confidence.

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[16] *continued*

1994, a man shot and killed two women at two abortion clinics in Brookline, Massachusetts; and on February 8, 1993, three doctors were wounded in a shooting rampage by an emergency room patient at the County-USC Medical Center in Los Angeles, California. The number of shooting incidents at schools is, distressingly, too high to count.

Developments in the Law—Privileged Communication: Part II. Modes of Analysis, 98 Harv. L. Rev. 1471, 1481 (1985) (citations omitted).

We are cognizant of the fact that *all fifty states have recognized the need for and have adopted varying forms of the psychotherapist-patient privilege.*[17] *See* Developments in the Law: Part IV, 98 Harv. L. Rev. at 1539 ("the psychotherapist-patient privilege has won consistent approval from courts and commentators"). Although federal common law governs our recognition of privilege in this case, *see In re Pebsworth*, 705 F.2d 261, 262 (7th Cir. 1983), the law of privilege as developed by the states is not irrelevant as the Supreme Court "has taken note of state privilege laws in determining whether to retain them in the federal system." *United States v. Gillock*, 445 U.S. 360, 369 n.8, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980); *see also Memorial Hospital v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981) (quoting *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976)) ("*'[a] strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy'* ") (emphasis added); *William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982) (federal courts are not precluded from "resort[ing] to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled"). *The widespread*

recognition of the psychotherapist/patient privilege in all fifty states is strong evidence that "experience with [the privilege] has been favorable." In re Doe, 964 F.2d at 1328 (emphasis added).

Particularly significant to the case before the court is the *Illinois Mental Health and Development Disabilities Confidentiality Act*, 740 ILCS 110/1-110/17 (1994), which expressly recognizes a psychotherapist/patient privilege:

> *[I]n any civil*, criminal, administrative, or legislative proceeding, *or in any proceeding preliminary thereto, a recipient*, and *a therapist* on behalf and *in the interest of a recipient, has the privilege to refuse to disclose and to prevent the disclosure of the recipient's record or communications.*

Id. at 110/10 (emphasis added). The term "therapist," as defined by the statute, includes any "psychiatrist, physician, psychologist, *social worker*, or nurse providing mental health or development disabilities services . . . ." *Id.* at 110/2 (emphasis added). Illinois law thus explicitly extends the privilege to communications with a licensed clinical social worker, like Karen Beyer.

For these reasons, *we recognize the existence of a psychotherapist/patient privilege under Rule 501 of the Federal Rules of Evidence.*[18] However, we also note that the privilege we recognize in a case of this nature requires an assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests. *In re Doe*, 964 F.2d at 1328; *see Trammel*, 445 U.S. at 52 (the question is "whether the privilege . . . promotes sufficiently important interests to outweigh the need for probative evidence in the administration of

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[17] *See* Developments in the Law: Part IV, 98 Harv. L. Rev. at 1539 (noting that by 1985, 45 states, not including Alaska, Iowa, Nebraska, South Carolina and West Virginia, had enacted psychotherapist/patient privileges); Alaska Stat. § 08.86.200 (1994); Iowa Code § 622.10 (1993); Neb. Rev. Stat. § 27-504 (1994); S.C. Code Ann. § 44-22-90 (Law. Co-op. 1993); W. Va. Code § 27-3-1 (1994). *Many of these state statutes specifically extend to communications with licensed clinical social workers. See, e.g.*, Cal. Evid. Code § 1010 (West 1994); Fla. Stat. ch. 90.503 (1994); Va. Code Ann. § 8.01-400.2 (Michie 1994).

[18] We note that the psychotherapist/patient privilege protects only confidential communications, *i.e.*, all the information learned by the psychotherapist or counselor during treatment that is necessary for treatment. *See* Developments in the Law: Part IV, 98 Harv. L. Rev. at 1540.

. . . justice"); *cf.* Fed. R. Evid. 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"); Developments in the Law: Part IV, 98 Harv. L. Rev. at 1544-47 ("Because the privilege impedes the judicial truth-seeking function, courts and legislatures have generally limited the privilege to cases in which its application would be consistent with its underlying purposes of facilitating medical diagnosis and treatment"). We acknowledge that "[e]videntiary privileges in litigation are not favored." *Herbert v. Lando,* 441 U.S. 153, 176, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979). "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for the truth." *United States v. Nixon,* 418 U.S. 683, 711, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). Accordingly, we will determine the appropriate scope of the privilege "by balancing the interests protected by shielding the evidence sought with those advanced by disclosure." *In re Zuniga,* 714 F.2d at 640.

We decline to speculate as to what situations would call for the abrogation of this privilege. Instead, we confine our analysis to a factual situation of this nature, where the balance of the competing interests tips sharply in favor of the privilege if we hope to encourage law enforcement officers who are frequently forced to experience traumatic events by the very nature of their work to seek qualified professional help. The plaintiffs sought disclosure of the confidential communications between Officer Redmond and Karen Beyer, a licensed clinical social worker.[19]

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[19] Professionals with quite a variety of job titles and descriptions provide mental health care to patients. Although we have consistently referred to the privilege we recognize in this case as *the psychotherapist/patient privilege, we note that this privilege extends*

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There were numerous eyewitnesses to the shooting, including Officer Redmond and several of Allen's brothers and sisters, four of whom testified at trial. Officer Redmond testified at trial as to her recollection of the circumstances leading up to the incident. Thus, the plaintiffs' need for Officer Redmond's personal innermost thoughts about the shooting incident were cumulative at best. In contrast, Officer Redmond's privacy interests were, and are still, substantial. Officer Redmond sought professional counseling after an unquestionably traumatic and tragic event she experienced in the line of duty. Her ability, through counseling, to work out the pain and anguish undoubtedly caused by Allen's death in all probability depended to a great deal upon her trust and confidence in her counselor Karen Beyer. Officer Redmond, and all those placed in her most unfortunate circumstances, are entitled to be protected in their desire to seek counseling after mortally wounding another human being in the line of duty. An individual who is troubled as the result of her participation in a violent and tragic event, such as this, displays a most commendable respect for human life and is a person well-suited "to protect and to serve." Based on the facts and circumstances presented in this record, we recognize the existence of the psychotherapist/patient privilege in this Circuit and thus the confidential communications between Mary Lu Redmond and her licensed clinical social worker Karen Beyer are protected from compelled disclosure.

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[19] *continued*

to other mental health care providers as well, including licensed clinical social workers. Drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose. Indeed, social workers have been characterized as the " 'poor person's psychiatrist.' " Developments in the Law: Part IV, 98 Harv. L. Rev. at 1550 (quoting Comment, Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers, 61 Calif. L. Rev. 1050, 1050 (1973)).

III. CONCLUSION

The judgment of the district court is REVERSED and the case is REMANDED for a new trial consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004
CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs-Appellees,

v.

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 4153 **Milton I. Shadur,** *Judge.*

[April 6, 1995]

JUDGMENT — ORAL ARGUMENT

Honorable John C. Godbold, Circuit Judge*
Honorable Harlington Wood, Jr., Circuit Judge
Honorable John L. Coffey, Circuit Judge

The judgment of the District Court is REVERSED and the case is REMANDED for a new trial, in accordance with the decision of this court entered on this date. Each party to bear their own costs.

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* The Honorable John C. Godbold, of the Eleventh Circuit is sitting by designation.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004
CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs-Appellees,

v.

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 4153 **Milton I. Shadur,** *Judge.*

[May 12, 1995]

ORDER

Honorable John C. Godbold, Circuit Judge*
Honorable Harlington Wood, Jr., Circuit Judge
Honorable John L. Coffey, Circuit Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* The Honorable John C. Godbold, of the Eleventh Circuit is sitting by designation.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
March 26. 1992

[2] THE CLERK: 91 C 4153, Carrie Jaffee vs. Hoffman Estates. Motion for protective order, motion to quash.

MR. ROGUS: Good morning, your Honor. Gregory Rogus appearing on behalf of the defendants.

MR. FUTTERMAN: Good morning, your Honor. Ronald Futterman on behalf of the plaintiffs.

THE COURT: Good morning.

Well, there are two issues that are presented here. One is the protective order motion on the part of the plaintiffs. The other one is this motion to quash filed by the defendants, as to which I have received a preliminary response after I had done my own homework anyway.

Let me, if I may, deal with that motion to quash first, something that gave me in the immortal Yogi Berra's words a sense of "Deja vu all over again," because as both of you know our Court of Appeals in a case called *Memorial Hospital against Shadur* dealt with the related issue, you know. I hauled that out. That's

664 F.2d 1058, and at page 1061 footnote 3, the court confirmed, as I had held below in the case that the unsuccessful mandamus was taken from, that where there were state and federal claims, the federal claim is the one that would basically control issues of admissibility (which are of course closely linked up with issues of discoverability), although we certainly look to state law to inform the judgment about what the federal law should be under Federal Rule of [3] Evidence 501.

What I also did in terms of a little more homework was to see whether there was any further enlightenment on that general approach since then, and I found another familiar case *von Bulow against von Bulow* out of the Second Circuit. That's 811 F.2d 136 at page 141. That said in part, where there were in that case a RICO claim and state law claims based both on diversity jurisdiction and also on what was then pendent jurisdiction, now supplemental jurisdiction, the court said:

> "The evidence sought from the witness [as to whom a privilege, you see, was claimed] is relevant to both the federal and state claims. In such situations courts consistently have held that the asserted privileges are governed by the principles of federal law. . ."

[citing two cases, one of them the Memorial Hospital case, then going on to say]:

> "This approach is consistent with the legislative history of Rule 501" [quoting the Senate Report and so on].

So I think that it's pretty plain that that's where we go for the answer.

When I looked at Weinstein on Evidence I found that Judge Weinstein, and this is at paragraph 501[02] at page 501-25, said (although he didn't agree with the principle totally) that the Judiciary Committee's Report had said that "[i]f the rule [that was there] proposed results in two [4] conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rules favoring reception of the evidence should be applied."

Now you know that kind of tie breaker is something that has some things of course to commend it and others not, because it doesn't, I think, give sufficient weight perhaps to underlying policies. But looking further, what I have found controlling here is that as both of you know when Rule 501 was adopted Congress vetoed what the Supreme Court had proposed. The Supreme Court had proposed a whole series of provisions very much along the same lines as what was done with Rule 803, the hearsay rule — that is, it had set out a whole series of proposed privileges and defined them. And Congress then torpedoed that by requiring what we now have, which is the short and quite ambiguous version that calls on us to do a lot of creative thinking and application.

But my sense has consistently been, when dealing with these problems, that the place to go as the best source is to look at what the Supreme Court's proposals had been and what have now been referred to as the "Standards," although they are not the Federal Rule of Evidence. And when I looked at that I found that Standard 504 is one that adopts a privilege for psychotherapists. Again referring to Weinstein at 504[03] at page 504-17, there is a psychotherapist-patient privilege, and that expressly does not apply to social workers. It views [5] social workers as not in the same professional capacity, unless the social workers are acting in conjunction with and basically as aids to the medical professions.

Well, maybe I misspeak in referring to "medical professional." I don't want to pause on the distinction between psychiatrist and psychologist. But let me characterize it as the professional whose work it is whose basic activity it is to participate in this in terms of the sort of established discipline that is not ascribed to the social worker, who despite the training (and perhaps despite licensing) is not placed in the same category.

What Weinstein says — and this is at page 504-19 to 20 — he says:

> "It has been suggested that the same reasoning applies to social workers not licensed as psychologists to the extent that they are performing diagnostic or treatment functions. Effective therapy by a social worker benefits society but cannot be rendered unless the client feels free to divulge potentially damaging information. Nevertheless, unlike statutes in some jurisdictions, the Federal

Evidence Standard does not exempt communications to social workers from disclosure unless the social worker is participating in diagnosis and treatment under the direction of a psychotherapist."

Then later on in 504[05] the description of the same [6] Standard goes on to say this, and this is at page 504-24:

> "In addition, Standard 504(a)(3) treats as confidential those communications made to the psychotherapist in the presence of a third group of persons, those 'who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.' Communications to social workers, psychologists engaged in functions not covered by subdivision (a)(2)(B) and other nonpsychotherapist treatment personnel are confidential if a psychotherapist is presented and authorized and is supervising their participation."

So where I come out on this one is that someone who is engaging in a kind of counselling to assist someone, maybe over a traumatic experience — someone in the category of Ms. Beyer, who is identified as a licensed clinical social worker and a certified employee assistance counselor — does not stand entitled to privilege under the federal Standard, and that my perception is that the guide to how we should function in these cases, where we are looking at a federal claim as well as a state claim, is that it is the federal standard that ought to control and not the provisions of an Illinois statute that might extend beyond that.

And of course I recognize, and it should be plain I think from what I have said, that this is an area in which there [7] are competing interests. But it seems to me that whenever we talk about resolving competing interests we have to make judgments about where the weight falls in terms of those. And where the key claim that's involved is, for example, a 1983 claim — a federal claim — my sense is that the federal rule ought to apply in precisely the same way as if the 1983 claim were the only claim in the case. So that I think that the balancing of interests comes down to a denial of the motion to quash.

Now I took a look at the response filed by plaintiffs for the motion to quash, as well as the defendants' motion. And I ought to make plain that the first question that Mr. Futterman had directed, which is whether the Court ought to recognize the therapist-patient privilege, seems to me not to be presented by the case for the reason I've mentioned. That is, I am perfectly willing to treat the therapist-patient privilege if that is meant to include the one that the Standard covers. And that's the issue that was dealt with in both *Zuniga* and *Corona* as applicable.

It is rather the second question Mr. Futterman raises that I am focusing on. And incidentally, you know when I looked at Judge Marshall's opinion, *Jennings against D.H.L. Airlines*, there is nothing in that that is at all inconsistent with what I've said here, because he was dealing with someone of a quite different category. The one by Magistrate Judge Rodovich, that [8] *Cunningham against Southlake*, of course makes a determination exactly the one that I have just identified. So my ruling on that one is that the motion to quash is denied.

Now having said that, it seems to me that it is appropriate nonetheless to follow the same principle that I have dealt with in a couple of the earlier matters in this case — and that is, to make sure that there is an appropriate protective order that's in place. And in this instance it strikes me that a "counsel's eyes only" protective order would be quite appropriate unless there is some suggestion as to why that should not be applicable.

MR. FUTTERMAN: The only exception to that, your Honor, is the possibility that we may desire to consult a clinical psychologist —

THE COURT: Another — a professional, you mean?

MR. FUTTERMAN: Yes.

THE COURT: But you are not talking — when I talk about that I really want to make sure that the client is insulated from this — that is, I consider the lawyers as professionals in this one. And if what you are saying is that for evaluative purposes you might want to consult a professional —

MR. FUTTERMAN: Yes. I have no problem with your Honor barring the clients — our clients — from having access to the deposition or being present at the deposition.

[9] THE COURT: Okay. Mr. Rogus?

MR. ROGUS: I anticipate in light of the Court's ruling this morning several problems. Namely, with all due respect to the Court and the Court's holding with regard to my motion, I have the interests of obviously Redmond to assert. I am anticipating that Ms. Beyer will, in disagreement with the Court's ruling, refuse to respond to questions and produce the records. I think the only thing I can suggest at this point —

THE COURT: You are going to have a replay —

MR. ROGUS: — is draw it to the Court for consideration, given the novelty of this issue and the importance of its bearing upon this case and where we go from here, if we could certify this question to the appellate court.

THE COURT: Well, it doesn't qualify. You know there was just an opinion that came out in the Seventh Circuit, by the way, within the last week in which at least the panel that was writing the decision (I think it was Judge Wood who wrote it) was reviewing an effort by my former colleague Judge Bua to create appealability where it was not available, and the court rejected that. It found that there was no final order, and in the course of it commented on a colloquy that Judge Bua had had with the lawyers in the case saying, "You know, those people up there, they never take 1292(b) certifications, they never take 54(b) certifications, so we've got to find a different remedy."

So Judge Wood's opinion says very carefully, "Well now [10] wait a minute. You know we have honored 1292(b) certifications in this situation and that situation, and we have honored 54(b) certifications in this situation and that one." And of course the problem is, it's sort of like "What panel do you listen to?" because his colleagues on that panel were not among those who have given the most difficulty for that kind of effort to get piecemeal appeals, as some members of the court are fond of calling them, you know. But the point seems to me that, even accepting that invitation as posed, we are not here dealing with a controlling question of law. That is, we are dealing with something that's an interesting and useful matter in the course of this litigation, but you can hardly characterize it as a controlling question of law.

And I don't think that this is a good candidate for 1292(b) certification. When I said you may replay it, for all you know, if you want to make — want to bring the issue on — there are ways in which you may be able to do that. That's up to you.

But my determination is that this is one in which I perceive the Supreme Court's then 8 to 1 vote, that would have established the Standard that I have just identified, as being the best guide for any District Judge in terms of dealing with such privilege issues. And when it comes to balancing the competing interests, it seems to me that there is a great of weight that has to be ascribed to that, notwithstanding the fact that a particular state may have, as Illinois has, included in its statute and in its categories of people who are within the scope of that statute, people labeled as "social workers." You know, that may represent the results of lobbying effort. Although you know I don't want to personalize this, I have a daughter who is a certified social worker. I know the training that's involved. And you know, with all respect, it is simply not the same in the professional context as the established disciplines to which I have referred. And that, I think, properly informed the Standard that the Supreme Court adopted.

So you know I recognize that there are things to be said on both sides of it. But it seems to me that when we are dealing with a federal claim, the kind that Congress has said is available under Section 1983, the balancing tips substantially in the direction I've indicated.

So anyway that's my ruling.

MR. FUTTERMAN: Your Honor, with respect to the protective order, Mr. Rogus informed me this morning that he would like to address a couple of concerns that he has with respect to it in some dialogue with me today, and if we can't reach agreement on language we would come back tomorrow. I have heard briefly what his concerns are, and I am optimistic that we might be able to work it out. It's just that we have not heard anything to that effect today.

THE COURT: All right. I will simply enter and [12] continue that one. Okay?

MR. FUTTERMAN: All right.

THE COURT: And I won't set it for tomorrow. That is, if you are able to resolve the matter as between you, and you want to tender a proposed form of protective order, you can do that. If you can't resolve the issue, then if you have to come in on the motion what you ought to do is just let my minute clerk know. You are not going to have to re-serve notice. But there is no particular point of my putting it on the schedule if you're not sure of whether it is going to have to be done in that form or not. Don't you think that that makes sense?

MR. FUTTERMAN: Sure. We will try to resolve our differences today and submit a draft order tomorrow.

MR. ROGUS: I share Mr. Futterman's optimism. I think we will be able to work something out between the two of us.

THE COURT: Fine. Thank you very much.

MR. ROGUS: Thank you, your Honor.

MR. FUTTERMAN: Thank you, your Honor.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
April 14. 1992

[2] THE CLERK: 91 C 4153, Carrie Jaffee vs. Hoffman Estates. Plaintiff's motion to compel presence at deposition.

MR. FUTTERMAN: Good morning, your Honor. Ronald Futterman on behalf of the plaintiff.

MR. FLAXMAN: Kenneth Flaxman on behalf of the plaintiff.

MR. ROGUS: Gregory Rogus on behalf of the defendants.

Your Honor, I have prepared, and intended to file yesterday, a written objection to the plaintiff's motion, but we ran into the problem of the building being closed down, and I had courtesy copies prepared and they told me I couldn't drop them off by you yesterday. I would seek leave of court to file written objections.

THE COURT: Sure. And George, do you want to hand that to me?

(Document tendered)

I had read your letter, of course, which was included as part of your submission.

Well, Mr. Rogus, the difficulty with what you are asserting here is in what you assume the purpose of this discovery to be, if the purpose were to look into the officer's current mind set or any impact on the officer of the episode, clearly that's not something that would come into the case, because you're quite right the issue is one of objective reasonableness: How would the reasonable law enforcement person [3] confronted with the situation have reacted?

But you see the difficulty is that part of what has to be determined in order to arrive at that is to identify what the circumstances really were. And there is a high likelihood, I would think, that to the extent that discussions have taken place between your client and this consultant Karen Beyer, to the extent that they are fact-oriented — that is, having to with description of the episode, recollections of the episode, all those things — they go directly to that issue. You know, resolving issues of fact is almost invariably a matter of resolving differing versions, differing recollections. And it is just as much an appropriate source of discovery to determine what the other side's perception is as it is to advance a party's perception.

Especially, you know, Rashomon is a familiar reference (I don't know whether that won the Academy Award, but it certainly should have, if it didn't) — and it's so apt for lawsuit situations that it's very hard to imagine a more direct parallel. All the psychological studies about how witnesses react to instantaneous situations — the familiar examples in which somebody says it was a blue car and somebody says it was a red car — serve as the best possible illustration of the fact that the way to sort out facts is to get the different witnesses, recollections and versions. And that's really the focus, you see, of the determination that I made. It wasn't [4] that inquiry was appropriate because it was a consultation with somebody who was in a counselor position. It wasn't because of the relationship that the determination was made that it was a nonprivileged communication. It was because that communication, to the extent that it elicited information that could lead to admissible evidence, which is the standard under Rule 26(b)(1), is just as much something for a party's access as any other item.

MR. ROGUS: That still leaves me in some doubt, your Honor, with regard to counsel's stated intention of his using the

information to consult some expert or some psychologist on his side of the case.

THE COURT: Well, I don't know. You know —

MR. ROGUS: I don't know if that enters into his actual intentions or not. All I know is that he did state it in open court when we were before your Honor on March 26th, and I not quite sure where that fits into the equation.

THE COURT: Well, you don't know how they want to use it. They may want to consult with people on the theory of memory or anything. I haven't the slightest notion. But there is no reason that they can't make such use of it in that sense. One thing they are not going to be able to do, of course, and I have not even suggested this, is to let us say to have their own expert designated for purposes of conducting a mental examination of your client. That's not in issue. All we are [5] dealing with here is the question about discovery of prior communications.

So what you have said is really not responsive to the point that's made here.

MR. ROGUS: Your Honor, if I may then — well, perhaps I am anticipating the ruling at this point — but I would point out that in plaintiff's motion he has included excerpts from Ms. Redmond's deposition, with regard to specific questions that he intended to put to Ms. Redmond. And if I am to understand the court will —

THE COURT: Let me see. I don't have that. I have your response in front of me. George — wait a minute. I have got your motion. Wait a minute — their motion. Let me take a look at that.

MR. ROGUS: I believe they are —

THE COURT: Which one are you seeking to refer to?

MR. ROGUS: Well, at page 190 of the transcript that is attached to his motion —

THE COURT: Yes.

MR. ROGUS: There is a list of questions that Mr. Futterman put on the record, and which I believe would be the subject of the present motion. I guess my inquiry at this point would be as to whether the Court's present ruling would pertain to all of these questions or just some of them, because some of them I think will go beyond. [6]

THE COURT: Well, I don't know how it would be relevant to how long the counseling should continue. That doesn't seem to me to be in it. But for example the discussion of subjects other than the shooting might be, I don't know. I am not going to permit one question to serve as a springboard to get into nonrelevant issues, but that's kind of a background question. The question about whether she's discussed the counseling sessions with Karen Beyer with anyone else, doesn't —

MR. ROGUS: She has answered that question. Because that did not go into content, as you can see from the next several lines thereafter.

THE COURT: Okay.

MR. ROGUS: On page 191.

THE COURT: Well, if the —

MR. FUTTERMAN: Your Honor, it's theoretically possible that she may have waived the privilege already.

THE COURT: I understand.

MR. FUTTERMAN: We have asked Mr. Rogus to make available the persons who have been identified as the persons to whom disclosures about the counseling sessions have been made.

THE COURT: Yes. Right. And I was going to say — you know, before Mr. Rogus talked about that having been responded to, that one obvious purpose of that is to go into potential waiver of any asserted privilege in any event. The [7] question about discussion of the emotional state immediately prior to firing is I think — you know, all that these questions present are nonsubstantive issues — that is, the talk about scope of discussion rather than inquiring into the particulars. So it seems to me that it's really premature for me to be ruling on these.

What I would suggest that you ought to do is when you resume the depositions, simply make arrangements for the Magistrate

Judge who is assigned to the case, see about his or her availability during the course of the deposition in case any questions arise as to which there is a dispute. And you can — I don't know who that is.

MR. FUTTERMAN: I think it is Magistrate Lefkow. I am not sure.

MR. ROGUS: I don't have the Magistrate designated.

MR. FLAXMAN: Do we need a specific order to —

THE COURT: Yes. George, what we will have to do is to enter an order referring — I am going to enter a general order referring discovery matters, although don't misunderstand. If you have disputes about the sort of thing that has been presented to me in the past, you need not concern yourself. You can come back in here, because I don't want to saddle the Magistrate Judge with more than would be necessary. But the general order of reference will then suffice so that you can consult with him or her. Okay. [8]

MR. FUTTERMAN: But, your Honor, I think we will need an order with respect to motion to compel her appearance.

THE COURT: Yes. What about — now I wasn't sure whether what you were saying, Mr. Rogus, is that your client is not going to comply?

MR. ROGUS: What I am saying at this point is now that the Court is ruling on this motion, I have an additional order that I obviously have to discuss with my client before an ultimate decision is made by my client.

THE COURT: Well, I am going to order that she return to the deposition table, and that will be very quickly. How soon would you plan to resume?

MR. FUTTERMAN: We had specified a date that Mr. Rogus informed me that he's going to be out of town next week. And what I would suggest is that he is going to need some time to talk to his client. We are prepared to go forward as soon as Mr. Rogus is able. And we can do it a week following the next any day.

THE COURT: I will make it on or before April 30th. That will give you time after you get back, Mr. Rogus, to have talked to the client. okay.

MR. ROGUS: Very well.

MR. FUTTERMAN: We had a status set for tomorrow, your Honor.

THE COURT: Yes. There is no reason to hold that.

[9] MR. FUTTERMAN: Right.

THE COURT: I will set the matter — I will vacate the April 15th status and reset that for —

MR. FLAXMAN: How about April 30th, Judge?

MR. FUTTERMAN: Because we may know by that time whether the defendant is going to comply.

THE COURT: All right. I will give you April 30th at 8:45.

MR. FUTTERMAN: Thank you.

MR. FLAXMAN: Thank you, your Honor.

MR. ROGUS: Thank you.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
June 23, 1992

[2] THE CLERK: 91 C 4153, Carrie Jaffee vs. Hoffman Estates. Motion to reconsider and motion to quash.

MS. NYE: Good morning, your Honor. Sandra Nye on behalf of Karen Beyer. Ms. Beyer just stepped out to the ladies, room just a moment ago. I wonder if it would be too much to ask the Court to just hold this for a moment until she returns? I regret it, your Honor.

MR. ROGUS: Good morning, your Honor. Greg Rogus on behalf of the defendants.

MR. FLAXMAN: Kenneth Flaxman for the plaintiffs.

THE COURT: Okay. We will recall it in a minute or two.

(Whereupon the Court directed its attention to other matters on its call, after which the following further proceedings were had herein:)

THE COURT: 91 C 4153, Jaffee vs. Redmond.

I have received this long submission in support of a motion for reconsideration of the denial of motion to quash the subpoena for deposition. it seems to me that the matters that are set out there, which are very thoughtfully set out in terms of what may be characterized as a different regime in terms of the level of professionalism that may attach to clinical social work — although I would hasten to say not as to all of the services that are described in what is characterized as the "Employment Wellness Program," or functions performed by Ms. [3] Beyer — but it seems to me that what we should do in this kind of situation is to focus on the particular nature of the communication that's involved. Yes?

MR. FLAXMAN: You are getting one step ahead. This motion isn't made by Ms. Redmond, it's made by the therapist. Ms. Redmond has been deposed and has answered questions.

THE COURT: Well, I understand that. But the discovery that is sought to be blocked by this is by a third-party witness, as I understand it, who is now being sought to be deposed? Is that not so?

MR. FLAXMAN: That is correct. But before we get to the question, does she have standing to assert the privilege of the witness?

THE COURT: Just a minute. Of which witness?

MR. FLAXMAN: Does she have standing to assert the confidentiality or the claim to confidentiality, the privilege of the client of the defendant?

THE COURT: Well, wait just a minute. What is being sought is, as I understand it, as to communications made by Ms. Redmond, the party, to her — not statements that may have been made by Ms. Redmond in response to an already-taken deposition of her own. Right?

MR. FLAXMAN: Well —

MR. ROGUS: That's correct.

MR. FLAXMAN: I am not sure if it is correct. we want [4] to ask this witness "What did Ms. Redmond tell you?"

THE COURT: Right. Okay.

MR. FLAXMAN: And Ms. Redmond has already answered those questions to the best of her ability.

THE COURT: She has answered — wait. She has answered what she told Ms. Beyer?

MR. FLAXMAN: Yes. She said —

THE COURT: Is that so?

MR. ROGUS: Your Honor, may recall that counsel came in —

THE COURT: I know about that, yes.

MR. ROGUS: On a motion to compel. And your Honor has in fact upheld Ms. Redmond to appear for a third session of her deposition pursuant to your Honor's order.

THE COURT: But wait a minute. My question is, at that point was she asked what she had said to Ms. Beyer?

MR. ROGUS: She was asked a number of questions going to the content of what she had discussed with Ms. Beyer.

THE COURT: Okay. Mr. Flaxman, your position, as I gather it now, is — let me see if I can find out which of two things you are saying. Are you saying that basically any further objection to the same line of inquiry is blocked by the fact that something has already been disclosed about that, or are you saying that Ms. Beyer, who is now sought to be deposed, cannot assert an objection to it, because she is not Ms. [5] Redmond? Which of those things are you saying?

MR. FLAXMAN: The last one — the latter. That the privilege, if there is a privilege, would belong to Ms. Redmond. Ms. Redmond was ordered to answer questions and chose to comply with your Honor's order. And we are now trying to lock the door after the horse has been let out.

MR. ROGUS: It was hardly a choice. There was a court order —

THE COURT: There is a choice, of course, and that is to stand mute and run the risk of contempt and then appeal a contempt —

MR. ROGUS: That is certainly a Hobson's Choice.

THE COURT: No, it's not a Hobson's Choice. That's happened. That's what happened in *Memorial Hospital,* as I remember it. And you know what I did there was to impose — in accordance with the doctrine of *molliter manus imposuit,* I imposed the least laying on of hands for purposes of creating an issue that could then be carried on up. I am frankly reluctant to find just a waiver in that sense. But is Ms. Redmond also asserting the same matters, though that hasn't been set up by a motion?

MR. ROGUS: Well, Ms. Redmond's position is, I think, set forth as fully as I could do it in the motion to quash and in our objection to the motion to compel that we have previously filed.

[10] THE COURT: No, no. Let me try again. Ms. Redmond has not joined in this motion — as it's framed, it's framed as a motion for reconsideration of a denial of the motion to quash the subpoena for deposition. That's a subpoena directed to Ms. Beyer, right?

MR. ROGUS: That's correct.

THE COURT: Now the prior ruling had to do with Ms. Redmond's continuing to testify, which she did. Okay. And then it also related to the taking of the Beyer deposition, right?

MR. FLAXMAN: Right. The first ruling was to quash the subpoena on Ms. Beyer. Your Honor denied that.

THE COURT: Right.

MR. FLAXMAN: Then there was our motion to compel Ms. Redmond to answer, and your Honor granted that.

THE COURT: Okay. Now are you now joining in this motion for reconsideration, because I haven't seen anything?

MR. ROGUS: Well, the motion was just filed in the last couple of days. I have not prepared a separate written submission. But I guess I am here to state to the Court that I would be joining in this motion to reconsider, yes.

THE COURT: Okay. Now there is a motion to reconsider, all right? And the deposition has not yet been taken — the prior deposition?

MR. FLAXMAN: That's correct.

THE COURT: Then what we have, I suppose, is a motion that says notwithstanding the fact that Ms. Redmond has responded in terms of her version of what it was that she said to Ms. Beyer, we are now — Ms. Redmond is now objecting to the inquiry along the same lines posed to Ms. Beyer, saying that her responses that she gave the last time were done under compulsion of the Court order. And that because they were done under compulsion of Court order, she should not be viewed as somehow having waived the issues so as not to be in a position to assert it now, if I can reframe it, right?

MR. FLAXMAN: I think we should be addressing that procedural issue before we get on to the merits.

THE COURT: I think that's right. Because I think that the question about standing given the assertion of a privilege, is something that does relate to the person in Ms. Redmond's position, or the person in Ms. Beyer's position. Okay. Now shy don't you address that then, Mr. Flaxman?

MR. FLAXMAN: I think it's their burden to show that there is standing — I mean the privilege that —

THE COURT: It's not a standing question. The question is really what I have posed — that is, is there any force to the idea that says, "Look. We were taken kicking and screaming to the alter, and this was not then a waiver because it was not voluntary."

MR. FLAXMAN: I think's it's a waiver because the information has been disclosed.

[8] THE COURT: That's a different question, really.

MR. FLAXMAN: I think — but I think that —

THE COURT: Because if the information is disclosed then you don't need this deposition. You are saying what you would like to have is someone else's version of a response to the same questions, because of the usual reasons that people who take depositions aren't always satisfied with getting the view of one party, for example, to a conversation. Very frequently depositions of both people who were in a meeting are taken because peoples, recollections differ, and for all of the familiar reasons. So it's not an answer to say, "Well, the questions had been asked and answered because the questions being asked and answered says I don't need the deposition."

MR. FLAXMAN: But what comes to mind there are cases where there is an attorney-client privilege and the client has testified about it and the lawyer says, "I am not going to testify, it's attorney-client."

THE COURT: That's a waiver. That's a waiver. And that's — you are getting back to the point that I made, which is a waiver is of course the voluntary surrender of a known right.

MR. FLAXMAN: I thought that knowing and intentional rather than voluntary —

MR. ROGUS: Voluntary, I think, is a necessary element and recognized by countless cases that have addressed this [9] situation of whether a waiver is —

THE COURT: I am reluctant under the circumstances to dispatch this one on what may be labeled as the technical ground of waiver, given the fact that the testimony was not — was given under compulsion of a Court order. Now I recognize that there was an alternative to that, and that was the one that I identified up front. I am not sure that failing to pursue that alternative necessarily converts the thing into the equivalent of a voluntary statement.

MR. FLAXMAN: I think it does. I think perhaps you should be getting written submissions from us. Because I think what you are really being asked to recognize here is a privilege not for the patient or the client, but for the therapist, which is in the Illinois statute that the therapist has the right not to disclose information if she feels it would harm the patient, even if the patient was deposed. I don't think that we are anywhere near that under the Federal Rules of Evidence.

THE COURT: That is right.

MS. NYE: If I may, your Honor —

THE COURT: No, I don't share that view.

Let me, if I may, turn to the substance of the matter. We have in the context in which privileges are well-recognized — the lawyer-client context, the confessional — blocked from exposure matters that bear for example on the commission of a crime. What has been done is to [10] sacrifice the basic notion that lawsuits are a search for truth to the recognition of the principles that underpin that kind of privilege.

By the way, you know we talk about lawsuits as being asserted for truth, and one of the seldom looked at provisions of Federal Rules of Evidence says that. That's you know Federal Rule of Evidence 102, one of those that rarely gets referred to because it doesn't have a precise impact on specific rulings. It talks about construing the rules "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Now that's I think both a powerful and a dominant aspect of what litigation is about in our system. And it is for that reason that we have provided narrow exceptions to the situation, the kinds of well-recognized and long-established and traditional privileges of the sort that I've referred to.

My sense is that despite what has been said thoughtfully here in support of this motion for reconsideration, that narrowly-based inquiry simply into what the disclosures were about — the version of events as given by Ms. Redmond to Ms. Beyer should be permitted. I an not talking about any of the other aspects of whatever dialogue may have taken place, whatever other consultation may have taken place, the [11] professional opinions that may have been rendered — determinations that may have been made about the treatment, therapy, anything else. None of those seem to me to be matters that, as far as would be sought in the nature of inquiry, ought to override the kinds of considerations that are identified in the motion for reconsideration. But the narrow inquiry, which is a matter of ascertaining events that are in sharp dispute as to how they evolved in the situation that leads to this lawsuit, are matters that I believe ought to be capable of inquiry of Ms. Beyer.

And my ruling on that then is that Ms. Beyer may be deposed, but deposed only with respect to the disclosures made to her by Ms. Redmond of the incidents of the day that relate to the matter that is at issue in this lawsuit.

MR. FLAXMAN: The problem that we have with that is that one of the questions that will be at issue before the jury is Ms. Redmond's ability to recall, whether her memory has changed, where she doesn't actually recall the events that happened that day. Other things that she might have told Ms. Beyer would be relevant to her memory and her ability to recall.

THE COURT: No, no, no. That's very attenuated. And you will be able to inquire about that in any number of different ways. But the idea of somehow testing memory by inquiring into other areas of discussion that the may have had and whether her current version may differ or may not differ [12] from that are really tangential. As far as I am concerned the, focal point here, given the very sharp dispute about what the events actually were, may fairly entitle you to inquire into what she said to Ms. Beyer on that score, notwithstanding the fact — and I recognize that the thrust of this argument is in part that the purpose of making that disclosure was for purposes of getting the assistance of someone who is characterized by state law as a professional in a way that I have found, and I continue to find, Federal Rule of Evidence 501 does not fairly call for an extension to cover. So that's the nature of my ruling.

I don't know whether to characterize it as a granting or denial of the motion for reconsideration. I did not, as you will recall, quash the subpoena. But what I am doing is defining the appropriate scope of inquiry in pursuit of that subpoena. And that's going to be a limited area of inquiry. Is there anything that's unclear about the scope?

MR. ROGUS: I think it's clear. You are just talking about questions about the events that she saw or that she partook in on the day of the incident?

THE COURT: That's right. What she saw and what she did on the day of the incident. And that's as relayed to Ms. Beyer.

MR. FLAXMAN: You know — I don't want to argue with you, although —

[13] THE COURT: You can do it any time. That's what you are supposed to do.

MR. FLAXMAN: I don't want to lose an argument, which is what often happens.

THE COURT: That's what you have already done.

MR. FLAXMAN: I think your Honor's ruling is too narrow, and I am not sure if my standing here can get you to understand why it's too narrow. We want to know why it is that Ms. Redmond has been in therapy so many times in such a long period of time. We want to know if Ms. Beyer has any opinion as to whether the weight loss that Ms. Redmond has had after the incident is related to Ms. Redmond feeling guilty about it, or not accurately reflecting the incident. We want to know if Ms. Redmond has complained about dreams that she has had — painful recurring nightmares that she has had — which could recall her recollection. There are a whole host of questions that we want to ask that would have been discussed in the course of therapy which really go to this woman's — the defendant's — ability to recall, to accurately recall what she saw.

MR. ROGUS: We have already addressed at some length in our past appearances before your Honor and in our written submissions the whole question of the total lack of relevance of these points that Mr. Flaxman is raising right now. And I think your Honor has already addressed them.

THE COURT: Well, I haven't been persuaded this [14] morning, if that's your question. I don't find, Mr. Flaxman, those things that I've characterized for better or worse as really tangential. It does not seem to me that you are entitled to go into the kinds of areas that you have talked about when that has been for purposes of this sort of professional consultation that we are talking about here. And this is really — in part that draws on issues of relevance, and in part it draws on the kind of reference that's made here to the quality of the person that's involved as the consultant.

MR. FLAXMAN: What I would like to obtain from your Honor, given your Honor's lack of — frequent lack of taking motions to reconsider, what I contemplate doing is coming back after we have deposed Ms. Beyer with her deposition and Ms. Redmond's deposition and affidavit from our expert to try to help you understand why it is that these inquiries that we want to undertake would be relevant. And what I would like to you to say is that "Mr. Flaxman, if you want to do that you can, and I will take a look at it."

THE COURT: Mr. Flaxman, if you want to do that you can.

MR. FLAXMAN: Thank you.

THE COURT: And I will take a look at it.

MR. FLAXMAN: Thank you, Judge.

MR. ROGUS: And I will address it at that point. Thank you, your Honor.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

EXCERPTS OF PROCEEDINGS BEFORE THE HONORABLE MILTON I. SHADUR, Judge

December 10. 1992

* * *

[41]

THE COURT: Okay. Well, I suppose I can reasonably pick up on where you left off. That's a distinction that I think in candor, Mr. Rogus, is meaningless. That is, I see no [42] distinction — no rational distinction — between the issue of judicial or any other factfinder determination of credibility for this purpose and determinations of credibility for any other purpose.

What we have, as I see this, is a situation in which unlike the one in which witnesses frequently indulge themselves in response to questions by testifying not in terms of pure recollection, whatever that term may be, and testifying in terms of what they believe must have happened, because common sense tells them that's what must have occurred, we have a situation in which Ms. Redmond is applying what she would characterize as kind of a purist position. That is, if I do not expressly recall something in its unvarnished form, the proper response for me is "I don't recall."

Although I may or may not have mentioned to you the lasttime, by chance I had the experience myself within the past couple of months of testifying in a state court lawsuit about a transaction in which I was the lawyer that went back to a period between 1967 and 1969. And I was asked, as you might guess, detailed questions on that subject. I sought to be as meticulous as I could be in terms of making exactly the kind of distinction that I have just referred to, that is, not wanting to testify about something, because I thought "Yes, it must have occurred in that way," but limiting myself to things that I truly recalled. With the assistance of the kind of things that [43] were available to me, I was indeed able to muster direct recollection rather than "it must have been recollection," and I testified to the best of my ability in that respect.

Mr. Rogus, you've correctly referred to the fact that memory is kind of an odd subject. There has been a lot that has been written about that. Mostly by the way, in the context of the "eyewitness" kind of thing, because there has been a lot of analysis of that type of matter in terms of credibility.

But I do not find that what has been said by Ms. Redmond today is entirely believable. I really do not find it believable that she would have such a nearly total absence of recollection about discussions about an enormously important event in her life, unless the mindset that she was approaching the questions with, was one that adopted an extraordinarily blinded approach.

Now I am reluctant to characterize that as the kind of willfulness that calls for a dramatic sanction — ultimate or nearly ultimate sanction — of the type that's been asked for on behalf of the plaintiff. The notion of foreclosing Ms. Redmond's opportunity, for example, to testify in connection with this trial, is a notion that I think is inappropriate. But it also seems to me that the notion that the plaintiff should be foreclosed from an opportunity to determine whether other statements that Ms. Redmond has made in the course of depositions, and therefore a kind of prediction of what she is [44] likely to testify to when the case comes to trial, may or may not be at odds with statements that she has made on other occasions. The notion that the plaintiff should be precluded from learning that is one that I would find equally unacceptable.

Now one obvious potential source of such other statement is Ms. Beyer, the person with whom, despite Ms. Redmond's lack of expressed recollection that she has told us about today, or lack of general recollection, whatever that word means — the question that you were asking that I sustained an objection to — it really passes belief that at least some of the areas that were inquired about by Mr. Futterman today were not indeed the subject of discussions as between Ms. Redmond and Ms. Beyer.

Accordingly my sense of the appropriate sanction, if you want to call it that, is to give the plaintiff access. If it cannot be derived from Ms. Redmond, if it cannot be revived from one end of that conversation — set of conversations — then they are entitled to have access from the other side — the other the party to those same conversations. And that means that as far as I am concerned the bars are pretty well down to the opportunity to have access to Ms. Beyer in terms of what she recalls of those conversations.

Now I don't know what — you know, all I have seen have been a couple of reports that have been edited here — and [45] I don't know what if anything has come out of that. Maybe counsel can fill me in about that? What has been the result of the efforts at discovery from Ms. Beyer?

MR. FLAXMAN: Well, we received that two pages which we filed with this motion.

THE COURT: Those pieces of paper?

MR. FLAXMAN: Those pieces of paper. And we have deferred redeposing her in the expectation that we might have an opportunity to expand those — rather than having her three depositions, it would be two. So what you see is what has been honored —

MR. ROGUS: She has been deposed. Your Honor may recall we fought over the issue of just what could be gone into at her deposition. I believe — you know, we had Sandra Nye here. We went through the additional submission that Ms. Nye submitted on behalf of the therapist as well as the submissions we did. And you ruled —

THE COURT: But what substantively has come out of that discovery?

MR. FLAXMAN: Oh, substantively that Ms. Beyer recalls conversations with Ms. Redmond about the incident.

THE COURT: And anything substantive about the specifics of those conversations?

MR. ROGUS: I believe there was some testimony by Ms. Beyer regarding her recollection of certain specific matters [46] dealing with the facts and circumstances of the incident that Ms. Redmond did discuss with her.

MR. FLAXMAN: There was a problem at her deposition when Ms. Beyer at times would say, "I am not sure whether I learned this from Ms. Redmond or from somebody else." And then there was — we were not provided with an opportunity to ask her who else she talked to or what else she knew about the case, which was the matter we presented to your Honor in the motion to compel.

THE COURT: Yes.

MR. ROGUS: But as far as the substance of facts and circumstances of the incident that's been covered with Ms. Beyer already at deposition.

THE COURT: With the same degree of specificity as the whole series of questions that Mr. Futterman posed to Ms. Redmond today?

MR. ROGUS: I don't know if each and every question was put to her, but I know there was a fairly detailed questioning of Ms. Beyer. But I am not going to represent to the Court that it was the exact same thing questions.

THE COURT: Right. Mr. Futterman?

MR. FUTTERMAN: Your Honor, I didn't take that deposition, but Mr. Flaxman did. But I looked at the transcript before the hearing today in preparation for it, and those kinds [47] of questions — the details of those questions — was not asked. It was much more general in nature. She was able to provide some specific that she remembered. She went through specific things that she remembered Ms. Redmond talking about. We did not go through the litany of questions we went through this morning.

THE COURT: Well, at a minimum it seems to me that if we have someone who states the total absence of recall, or near total absence of recall, as Ms. Redmond has, about a whole series of

subjects that practical judgment would tell us must necessarily have been the occasion for discussion between someone in Ms. Beyer's situations, given the circumstances under which she was called into the matter, and some one in Ms. Redmond's situation, then at a minimum one appropriate source of relief would be to enable the same kinds of precise questions — and in detail — to be posed to Ms. Beyer.

I don't want to speculate about — you know, I don't mean to play "Jacobowsky and the Colonel" — and that is, if this then that, and if the other thing, then this. That's where the classic line, then there are two alternatives, you know, comes from at each branch, until we ramify ad nauseam.

So that it appears to me that at a minimum the kind of alternative that I referred to I think the last time when we set this hearing — and that is, an unfettered type of examination of Karen Beyer — would be an appropriate course of action. [48] Because my determination — and I want to make this plain — is that I view Ms. Redmond's characterizations of lack of recollection as reflective of a desire not to recall. That is, not making an effort to engage in the process that I just described in talking about my own experience as a witness.

You know when someone is going to have an inquiry posed about something as recent as we have here, and as recent as May of '92 was, in relation to a traumatic incident of less than a year earlier, then it seems to me that the kinds of responses to be most charitable to Ms. Redmond that she gave are simply reflective of wanting to answer, if at all possible, "I can't recall," rather than making the kind of searching self-examination that I think was incumbent on her in connection with each of these things, and then generating the appropriate response to that.

So my sense is that the last thing that I would ever want to entertain would be the kind of ultimate sanction that the courts have sometimes met willful flouting of judicial orders with. It does not seem to me that this is a situation that calls for that result. But I think at a minimum what counsel are entitled to do is to go back and to inquire of Ms. Beyer in the same kind of detail — and whatever other details they may want to inquire about that's relevant to this litigation — and see what that produces.

If the answer to that one — well, no I am not going [49] to deal with it. I said I wasn't. And I won't.

MR. ROGUS: Your Honor, If I may.

THE COURT: Yes.

MR. ROGUS: I am sorry.

THE COURT: Well, that's least really it. I had told you last time when I made my oral ruling I had already indicated to you that this has an important relevance other than the general question of witness credibility that's always present. And that important relevance has to do with the fact that any statements that Ms. Redmond made during the course of her discussions with Ms. Beyer that bear upon the incident that's in litigation here constitutes nonhearsay matters that would themselves be admissible in evidence. And therefore it's all the more important that counsel have access to those.

MR. ROGUS: We seem to have a continuing difference of opinion over the scope of your rulings. From time to time I know we have argued on the record, off the record, you have used, your Honor, a couple of terms that I want to make sure that I have got the correct bearing on your definitional sense, because you used the word "unfettered" a short while ago. You have also said —

THE COURT: Unfettered. I use that not in terms of subjects that are unrelated to what's in this litigation. I mean unfettered in terms of anything that bears the same kind of relationship to the litigation that generally is set by Rule [50] 26(b)(1)) — and that is, information reasonably calculated to lead to the discovery of admissible evidence. I am not about to set a new standard for that, it's set by the Rules.

MR. FLAXMAN: I don't want to play "What will happen," but I know what will happen. I will ask Ms. Beyer, "What did Ms. Redmond tell you when you first met?" And Sandra Nye I will say, "That's not relevant to this case."

THE COURT: Well, of course it's going to be relevant. "What did she tell you" — you know, if that question is appropriately — when you say, "What did she tell you," you have to anchor it to matters that relate to our incident here, don't you?

MR. FLAXMAN: Well, I think not, Judge. Because we have a witness who has had 300 or 100 conversations with Karen Beyer, who said, "I can't recall if we discussed any of a 100 different things." I think we are entitled to know: can she recall anything else that was discussed with Karen Beyer. Why could she remember one thing and not another? Why could she remember, for example, why she talked about her dog being sick, but she can't remember shooting a man? Why can she remember that her shoelaces broke, but she can't remember that she saw a man with a knife.

THE COURT: I would permit that kind of inquiry in terms of subjects rather than particular conversations. That is, if she recalls other subjects that they discussed — subject [51] matter — then that may well bear on the question of credibility in terms of what may or may not be a stonewalling on this issue.

You know, I can't anticipate that, because I am not going to sit in on this deposition.

MR. FLAXMAN: I wasn't going to invite your Honor. But I think if we are having a deposition and it's going to be "counsel's eyes only," I think it would be just more efficient to have a deposition, "What did you say, what did she say to you," and —

MR. ROGUS: That approach is just too open-ended. I thought we have already addressed this subject ad nauseam back in the spring time, and your Honor had drawn the parameters. And now counsel is seeking basically for you to redefine the parameters.

THE COURT: Again I am disinclined to — you know, I don't know how this counselor goes about her business. I don't know whether she asked about somebody's sex life, or whether she asked about somebody's childhood, or whether she asked about those things, by I am certainly not going to give you open season on particulars of that kind of discussion, if they took place. I am just not going to do that. I will permit you to inquire about subject matter. Again if the counselor says, "Oh, yes. We talked about Ms. Redmond's childhood," or "We talked about her sex life," or whatever, I will permit you to inquire about subject matter, because if then we have a witness who [52] says, "Oh, I remember talking about that subject, but I don't remember talking about anything having to do with this subject,'' that would strain credulity. So that much I will permit you to do, but not again in terms of —

MR. ROGUS: The followup questions.

THE COURT: That's right.

MR. FLAXMAN: Well, but what we are doing is to depart from the general rule that objections at depositions about relevancy should be noted for the record and not ground to instruct the witness not to answer.

THE COURT: But that general ruling even in Eggleston against Plumbers, which voiced it in an opinion of —

MR. FLAXMAN: Judge Wood.

THE COURT: Even that, remember, is subject to the exception that things that come within privilege, for example, are not to be applied there. Things that on their face are not relevant, counsel has a responsibility not to pose questions in those terms. I am now telling you what ways you can deal with that, so you are given advance notice, which you seldom get. All right? And therefore you know the manner in which you can conduct this one. And therefore I would expect we are not going to have the occasion, I trust, for that kind of objection. But subject matter you are certainly entitled to inquire into for exactly the reasons that I have disclosed.

MR. FLAXMAN: I assume that we are also entitled to [53] get whatever note she has which relates to the subject matter?

THE COURT: Sure.

MR. ROGUS: Now there, your Honor —

THE COURT: On this subject matter?

MR. ROGUS: No. He's talking about other subject matters. He's talking about particulars on other subject matters.

THE COURT: Oh, he hasn't asked about other subject matters?

MR. FUTTEPMAN: Well, the notes reflect that there was a conversation about dogs without going into the — I mean it could be redacted, but I think consistent with your Honor's ruling we

should be able to get notes.

MR. ROGUS: What am I going to do, your Honor? Redact the language? I'll leave the word ''dogs'' on there and they are not going to be satisfied with that, and we are going to be right back in here.

THE COURT: I cannot — you know, there is a limit in terms of my speculating about what's going to come out in that sense. I have no knowledge of how that counselor conducts her activities, conducts her business, maintains her records, and therefore I am not going to extend it to that.

MR. ROGUS: Thank you, your Honor.

THE COURT: Okay.

MR. FUTTERMAN: Thank you, your Honor.

MR. FLAXMAN: Can we have another status to come back and keep on track?

THE COURT: Yes. What are we talking about from now? How much time?

MR. FLAXMAN. 3 or 4 weeks.

MR. ROGUS: Closer to 4, if you don't mind, because of the holidays.

THE COURT: Okay. I will give you January 7th, '93 at 8:45. That's 4 weeks.

MR. ROGUS: Thank you, your Honor.

MR. FUTTERMAN: Thank you, Your Honor.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge

April 6, 1993

THE CLERK: 91 C 4153, Carrie Jaffee vs. Hoffman [2] Estates, status.

MR. WILENS: Good morning, your Honor. Robert Wilens, W-i-l-e-n-s. Mr. Rogus is currently at the tail end of a wrongful death claim. He apologizes for not being here.

MR. FUTTERMAN: Good morning, your Honor. Ronald Futterman, Ken Flaxman and Jennifer Soule for the plaintiffs.

THE COURT: We don't have counsel here, I know, for Ms. Beyer. I would have expected that counsel would be here.

MR. FLAXMAN: I made a mistake yesterday about the time, and he might be making a mistake about the time.

THE COURT: Well, I am going to rule orally. This thing has been pending, and counsel can become apprised of what I am dealing with here.

What this record reflects is a constant shifting of positions by the parties that are responding here — whatever seems to be necessary to prevent plaintiffs, counsel from getting access to the records that are at issue. At one point the answer that was given to me was simply in terms of requiring an order from me. Then when that seemed to be easy of accomplishment, the answer shifted to the claimed need for Ms. Redmond to sign a particular form of release. Then it has become neither of those. Now Ms. Beyer isn't sure that anything will suffice to do the job.

Similarly, during her deposition Ms. Beyer [3] acknowledged that the documents are the property of her employer, the defendant here, the Village of Hoffman Estates. Now what is asserted on her behalf is that the notes are her property. Although I don't mean to digress on this issue because it's not going to control what I do here, an issue that is not dealt with is what happens even under the law that's cited for that proposition when the person, as in this case, is an employee.

So far as Ms. Redmond is concerned, what I heard during her original deposition was a wholly noncredible claim of a total failure to recall, really a stubborn and a patent kind of stonewalling. Then at the March 8th hearing Ms. Redmond responded to a direct question from me by stating that she would disobey any court order that she authorize Ms. Beyer to produce any notes.

What all of this leaves me with is the firm conclusion that there has been and continues to be a willful flouting of the Court's orders and authority, both by defendant Mary Lu Redmond and by Karen Beyer, who is the employee and the agent of the other defendant, the Village of Hoffman Estates. And I regret to say that has continued despite the fact that I have been more than patient, I believe, in giving each of them the opportunity for compliance.

What's clearly been reflected at the last evidentiary hearing is that each of them views herself as above the law, [4] preferring to follow her own counsel (and I use that in a nontechnical sense — I don't mean lawyer counsel, I mean her own self-asserted counsel) rather than to obey court orders or to challenge them in a legitimate way rather than by defiance. And what is important as well is that when I refer to each of them, that of course applies with equal force to Hoffman Estates, which has done nothing whatever to deal with matters within its own control, but has basically left it to this employee — this recalcitrant employee — Karen Beyer.

Now at this point the string has run out. Both defendants, Ms. Redmond and Hoffman Estates through its agent Karen Beyer, have frustrated the opportunity of the plaintiffs to engage in the discovery that is-plainly necessary to learn the potential impeachment of Ms. Redmond's version of the events. And again I say that Hoffman Estates has offered nothing constructive throughout this entire proceeding. Each of them — all three of them — refuse to budge or to comply despite the proposals that the Court has held out to minimize or to eliminate entirely any arguable infringement of privacy rights or possibly any applicable privileges.

Now that leads to the question of what solution should be applicable in the face of this kind of intransigence. Because that conduct has continued in the face of every opportunity for compliance, the recommendations on plaintiffs, behalf for a strong and appropriate response hold [5] persuasiveness.

What I will not do, however, is to order a default or a judgment in the plaintiffs' favor. Defendants' reply memorandum correctly points out that surely I am not in a position to deal with a whole host of factual questions. But it's equally true that the combined positions of these defendants have prevented the effective opportunity to cross-examine Ms. Redmond in important and critical aspects. Accordingly — let me back up before I deal with that. You know, I have referred to the cross effect of these respective' positions. in that regard I do not accept the suggestion by Ms. Redmond and Hoffman Estates that somehow it's really not a matter of their choice, as though they are somehow helpless in this situation. As I have said, at one point in Ms. Beyer's testimony she pointed to the lack of release from Ms. Redmond before she retreated to a fuzzy position, and then to the ultimate total refusal. Clearly if each of the parties had approached the matter constructively rather than in this obdurate fashion, this problem would long since have been readily capable of elimination.

Now having said that, I return to the question of remedy. And here it is. First, defendant Redmond will be precluded at trial from testifying as to her version of the event in which she shot Ricky Allen, because she and defendant Hoffman Estates have blocked the plaintiffs from effective cross-examination on that subject.

Second, Ms. Beyer, as a nonparty, has disobeyed court orders, and that matter will be referred to the United States Attorney for consideration of possible prosecution as criminal contempt under Federal Rule of Criminal Procedure 42(b). My sense of the matter is that that's a matter that should not — that should be assigned to some other District Judge. And that will be a matter, if the proceedings are pursued, that will be left to the Executive Committee for determination.

This thing has been sidetracked by these issues more than long enough. Where are we in terms now of getting ourselves to the posture of readying the case for trial? Let me here from plaintiffs-' counsel.

MR. FLAXMAN: I think we are at the point of setting dates for filing the pretrial order and setting for trial.

MR WILENS: To date plaintiffs have not disclosed an expert. I think that's still the case. So I don't think there is going to be any expert discovery then. If I am wrong, you can correct me. MR. FUTTERMAN: That's right. We are ready to set a date for the pretrial order.

THE COURT: All right. I will set then the final pretrial order, which can omit, as I ordinarily do in Section 1983 cases, any trial briefs, jury instructions and voir dire questions at this point. Those will be deferred until later on.

And therefore the final pretrial order should be capable of being filed by May 10th. The pretrial conference will be May 18th at 4:30. Thank you.

MR. WILENS: Your Honor, if I may ask one question.

THE COURT: Sure. BR. WILENS: By your ruling I wasn't quite clear. What is the conduct of Karen Beyer that you have specifically held that has violated this Court's order — I am sorry. Mary Lu Redmond that's violated this Court's order?

THE COURT: It's been her refusal to — it's been a combination of two things: One, the less-than-credible responses to the inquiries about her recollection of the information that she had provided to Karen Beyer — the thing that basically triggered this proceeding. But also and importantly, her combined failure and refusal to take any action from the outset that would lead to the provision of these materials by way of discovery. This is not much different from the classic jury instruction on proximate cause, in which a matter need not be the proximate cause, but it is sufficient for it to be a proximate cause where the conduct of more than one person in concert effectively creates the harms. And that's the situation that has existed here. Each one has been essentially pointing the finger at other when they finally get around to stating some kind of position and saying, "Well, it's not my doing," you know, "Look at her,,, And that's not not my doing," you know, "Look at her." And that's not persuasive in either situation.

MR. FLAXMAN: Thank you, your Honor.

MR. WILENS: Thank you, your Honor.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

MEMORANDUM

During the April 6, 1993 status hearing that this Court had scheduled for that purpose, it ruled on the motions by plaintiffs for the imposition of sanctions against the parties to this action and against witness Karen Beyer ("Beyer," an employee of defendant Village of Hoffman Estates). Plaintiffs' motion was based on the obstructionist tactics that the three respondents had pursued tactics that had blocked the legitimate efforts of plaintiffs' counsel to obtain relevant discovery as to what defendant Marylu Redmond ("Redmond") had told Beyer about matters that could potentially lead to the impeachment of Redmond's version of the events that form the gravamen of this action.

At the conclusion of the hearing, counsel who was appearing for Hoffman Estates and Redmond inquired as to the basis for this Court's finding of wrongdoing on Redmond's part, and this Court summarized those matters in terms of both Redmond's wholly noncredible responses during her own testimony — reflecting her purported failure to recall any information that she had provided to Beyer — and her other stonewalling tactics that had frustrated plaintiffs' efforts to obtain the discovery to which they were entitled.

This Court has now been provided with a copy of the transcript of the April 6 hearing, and one clarifying supplement is in order.

Although this Court's description of Redmond's conduct was accurate, the manner in which defendants' counsel had phrased the question was not.[1] Counsel's inquiry was framed solely in terms of Redmond's violations of an order of this Court. That of course was the only nature of Beyer's offense, for she had flouted this Court's order to answer questions in her deposition. As for Redmond, the conduct that this Court described in response to counsel's question involves her noncompliance with her discovery obligations under Fed. R. Civ. P. 37, conduct by Redmond that has interacted with Beyer's actions to thwart plaintiffs' legitimate efforts to obtain needed discovery.

Dated: April 8, 1993

/s/ Milton I. Shadur
Senior United States District Judge

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[1] This should not necessarily be read as criticism of counsel, who was not familiar with the case — he was pinch-hitting for the regular counsel who has acted for defendants throughout the case, but who was actively engaged in a trial elsewhere at the time of the hearing.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

EXCERPT OF CHARGE TO JURY

***

[746]

THE COURT: In this case you've heard evidence that Karen Beyer, while an employee of the Village of Hoffman Estates had numerous conversations with Mary Lu Redmond and made notes of those conversations. And you have also heard testimony that Ms. Beyer's notes were the property of the Village of Hoffman Estates. During the course of the lawsuit, this court ordered the Village of Hoffman Estates to turn over all of Ms. Buyer's notes to plaintiffs' attorneys. The Village was provided with numerous opportunities to obey the court order. And it refused to do that.

During the course of this lawsuit Mary Lu Redmond also testified that she would not authorize or direct Ms. Beyer to turn over those notes to plaintiffs' attorneys.

During Ms. Beyer's testimony she referred to herself as a therapist, although she is not a psychiatrist, not a psychologist. She's a social worker.

This Court has ruled that there isn't any legal justification in this lawsuit, based as it is on the federal constitutional claim, to refuse to produce Ms. Beyer's notes of her conversations with Mary Lu Redmond. And that such refusal was unjustified. Under the circumstances, you are entitled to presume that the contents of those notes would be unfavorable to Mary Lu Redmond and to the Village of Hoffman Estates.

(2)

Supreme Court, U.S.
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No. 95-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator for RICKY ALLEN, SR.,

Petitioner,

v.

MARY LU REDMOND and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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20 pp

QUESTIONS PRESENTED

1. Whether the existence and scope of the psychotherapist/patient privilege recognized by the Seventh Circuit in this case comply with Rule 501 of the Federal Rules of Evidence.

2. Whether the Seventh Circuit's decision to recognize the existence of a psychotherapist/patient privilege within the context of this case conflicts with decisions from other circuits.

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No. 95-266

In The

Supreme Court of the United States

October Term, 1995

CARRIE JAFFEE, as Special Administrator for RICKY ALLEN, SR.,

Petitioner,

v.

MARY LU REDMOND and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents Mary Lu Redmond and the Village of Hoffman Estates respectfully request that this Court deny the petition for Writ of Certiorari submitted by the Petitioner Carrie Jaffee.

OPINION BELOW

The decision of the Court of Appeals is reported at 51 F.3d 1346, and is reproduced in the Appendix to the Petition for Writ at pp. 1-24.

RULE INVOLVED

This case involves Rule 501 of the Federal Rules of Evidence, which is set forth verbatim at Page 3 of the Petition for Writ.

STATEMENT OF THE CASE

On June 27, 1991, Hoffman Estates police officer Mary Lu Redmond was dispatched to the Canyon Estates Apartment Complex regarding a reported fight in progress. Shortly after arriving there, the officer shot and killed Ricky Allen, Sr. as he ran from the front door of one of the apartment buildings onto and upon the front lawn. Within days thereafter, decedent's family members brought suit contending that the officer had no lawful reason to shoot, since, in their view, Allen was unarmed and was not in any apparent position of causing death or bodily harm to anyone else. The officer and her municipal employer, on the other hand, maintained that Allen was armed with a knife and was chasing, and gaining on, another individual. Redmond shot Allen because it appeared to her that he was about to stab the person he was pursuing.

The plaintiff, Carrie Jaffee, is the mother of Ricky Allen, Sr. She, together with Lechia Allen, the divorced mother of Allen's two children, brought a three-count

complaint contending: (1) that Redmond's actions violated the decedent's federal constitutional right not to be subjected to unreasonable seizures nor to be deprived of life without due process of law; (2) that Redmond's actions were wilful and wanton, thereby entitling the decedent's next-of-kin to damages under Illinois' wrongful death statute; and (3) that Redmond deprived Ricky Allen's children of their federal constitutional right to associate with their father. At no time during the course of this litigation did the plaintiffs amend their complaint to add any further claims. The plaintiffs abandoned their third claim at trial. (See Transcript of Proceedings, Dec. 20, 1993, Record (hereinafter "R.") 167 at p. 665)

During the course of pretrial discovery, an issue arose over whether the plaintiffs' attorney would be permitted to obtain discovery regarding the content of numerous conversations between defendant Redmond and Karen Beyer, a licensed clinical social worker who held the position of Director of Health and Human Services for the Village of Hoffman Estates and to whom Redmond went for professional counseling following the shooting.[1] All of

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[1] As the Seventh Circuit noted in its decision, under Illinois law, a licensed clinical social worker provides "mental health services for the evaluation, treatment, and prevention of mental and emotional disorders . . . based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress." 225 ILCS 20/3 (1994). A licensed clinical social worker is a person "who (1) has a master's or doctoral degree in social work from an accredited graduate school of social work and (2) has at least three years of supervised post-master's clinical social work practice which shall include the provision of mental health services for the evaluation, treat-

(continued...)

Officer Redmond's conversations with Karen Beyer after June 27, 1991 took place during counseling sessions. The defense objected primarily on the grounds that such communications were privileged. As the Seventh Circuit would later acknowledge, these communications would clearly be privileged under state law if it were controlling. See A.P.W. at 21. However, given plaintiffs' federal claim, the analytical focus became Rule 501 of the Federal Rules of Evidence and whether its inherent flexibility would allow such a privilege to be recognized as a matter of federal law. This issue gave rise to numerous motions, evidentiary hearings, and Court rulings.

The plaintiffs initially sought to inquire directly of Redmond at her deposition regarding the content of her counseling sessions with Beyer. The defendant refused, however, contending that any such communications were privileged. (R. 64, 65) Plaintiff then directed a subpoena to Beyer to testify at deposition and to produce her curriculum vitae and "all notes, records, reports pertaining to Mary Lu Redmond." (R. 64, Exh. A) Defendants moved to quash the subpoena, contending, once again, that any conversations occurring within the context of the counseling relationship, as well as any records, notes, or reports relating thereto, were privileged under both state and federal law. (R. 64, 65) The district court denied defendants' motion. (R. 67, 119-1) The plaintiffs then moved for an order to compel Redmond to appear for a third deposition session to answer questions about her conversations with Beyer. (R. 71) Over defendant's objection (R. 72), the court granted plaintiffs' motion. (R. 73, 117-1) This followup deposition then proceeded in the presence of a magistrate judge on May 11, 1992. (R. 78)

On June 23, 1992, Karen Beyer, through her attorney, filed a motion for reconsideration of the district court's previous rulings on the privilege issue. (R. 81) The defendants orally joined in this motion. (R. 117-2 at p.6) After the court denied this motion (R. 82, 117-2), Beyer was deposed. Plaintiffs' counsel then brought a motion to compel Beyer to answer certain questions to which objections had been made and to produce certain notes and documents. (R. 91) On September 30, 1992, the court granted this motion. (R. 92) Thereafter, plaintiffs moved the court for sanctions against Redmond, contending that her deposition answers relating to her conversations with Beyer were evasive and incomplete. Specifically, the plaintiffs sought an order barring Officer Redmond from testifying at trial. (R. 100) On December 10, 1992, the court held an evidentiary hearing, at which Redmond testified. (R. 106, 119-2) The court ruled that plaintiffs' counsel would be given further opportunity to depose Beyer and to review her notes. (R. 119-2 at pp. 41-54) Following this second installment of Beyer's deposition on January 26,

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[1] (...continued)
ment, and prevention of mental and emotional disorders." 405 ILCS 5/1-122.1 (1994). An individual cannot obtain a license to practice clinical social work until he or she passes an examination for the practice of clinical social work and has completed either (a) a master's degree in social work and 3,000 hours of satisfactory supervised clinical experience, or (b) a doctoral degree in social work and 2,000 hours of satisfactory supervised clinical experience. 225 ILCS 20/9 (1994). Karen Beyer received her master's degree in social work from Loyola University in 1969. At the time of trial, she had had some twelve thousand hours of experience in individual, family, and marital psychotherapy, and had participated in clinical supervision in psychotherapy for doctoral psychology students from several psychology programs. See Appendix to Petition for Writ (hereinafter "A.P.W.") at pp. 5-6, n.3.

1993, plaintiffs then filed a second motion to compel Karen Beyer to answer certain questions. Specifically, plaintiffs requested an order permitting unrestricted inquiry into statements made by Redmond to Beyer and requiring the production of all of Beyer's notes. (R. 110) The court granted this motion on February 5, 1993. (R. 112, 119-3)

Plaintiffs next filed a motion for sanctions against the defendant contending that she had instructed Beyer to refuse to comply with the court's February 5, 1993 order. (R. 116) An evidentiary hearing was held on March 8, 1993, at which both Redmond and Beyer testified. (R. 114, 119-4) After the parties submitted written briefs as requested by the court (R. 119-4 at pp. 49-51; R. 121, 122, 123, 124, 125, 126, 128), Judge Shadur granted plaintiffs' motion on April 6, 1993. (R. 129) Specifically, the court ordered that Officer Redmond would be precluded from testifying at trial regarding her version of the event "because plaintiffs' attorneys have been blocked from effective cross-examination." The court also referred the matter of Beyer's non-compliance to the U.S. Attorney's Office for possible criminal contempt proceedings. (R. 129, 139, 130) The case was then set to commence trial on December 13, 1993. (R. 136)

On December 8, 1993, defendants filed a motion to reconsider and to vacate the court's order barring Redmond from testifying at trial. (R. 142) By this time, there had been no finding of contempt entered by any judicial officer against Karen Beyer following the district court's referral order. (R. 142 at p. 3) On December 10, 1993, the court granted defendants' motion, but with the proviso that the jury would be informed that it could draw an inference that the records, notes, and documents which

had not been produced by Beyer would have contained information unfavorable to the defendants. (R. 143; R. 165 at p.13)

At trial, the plaintiffs called as a witness during their case-in-chief the defendant Redmond, and, over the standing objection of the defendant, (R. 169 at pp. 4-10, 17) interrogated her with regard to her conversations with Beyer. (R. 169 at pp. 17-32) Plaintiffs' counsel also called Beyer as a witness, and, once again over defendants' objection, examined her with regard to those conversations as well as her notes and records. (R. 169 at pp. 32-46)

At the jury instruction conference held on December 20, 1993, defendant objected to the court giving plaintiffs' instruction No. 8, which addressed the conversations between Redmond and Beyer and informed the jury, inter alia, that it was entitled to presume that the contents of Beyer's notes would be unfavorable to both Redmond and to the Village. (R. 167 at pp. 630-636; A.P.W. 67, 68)

The jury returned its verdict on December 22, 1993, awarding the plaintiffs $45,000.00 on Count I (the federal constitutional violation) and $500,000.00 on Count II (the state wrongful death claim). Judgment was entered on the verdict the same day.

On defendants' appeal, the Seventh Circuit recognized the existence of a psychotherapist/patient privilege under Rule 501 of the Federal Rules of Evidence, and held that the district court had erred in refusing to recognize that privilege and in requiring disclosure of the content of any of the counseling conversations between Officer Redmond and Karen Beyer. The Court accordingly reversed and remanded the case for new trial.

In this petition, the plaintiffs argue that the Seventh Circuit's decision conflicts with decisions from other circuits regarding the existence of a psychotherapist/patient privilege under Rule 501. Plaintiffs also contend that the decision is overbroad in its scope. However, a comparison of the Seventh Circuit's decision with those from other circuits which, it is urged, do not recognize the privilege reveals that there is no actual conflict sufficient to warrant review by this Court. Furthermore, analysis of the Seventh Circuit's language in recognizing the privilege within the legal and factual context of this case discloses that the decision is in harmony with this Court's directives regarding the flexible development of the federal law of privilege under Rule 501. Therefore, certiorari should be denied.

REASONS TO DENY THE WRIT

In an effort to invoke this Court's jurisdiction, the petitioners attempt to create a conflict where none, in fact, exists. Their perception of conflict arises from their own overbroad framing of the issue, which induces them to: (1) ignore or overlook this Court's observations and admonitions concerning the flexible development of the law of privilege under Rule 501 of the Federal Rules of Evidence; (2) ignore the vastly differing factual and legal contexts within which other circuits have addressed the existence and applicability of a psychotherapist/patient privilege; and (3) ignore explicit language contained within the decisions of the various circuits which serves to define and narrow the scope of those decisions and thereby eliminate any conflict except at the most superficial, non-controlling level of analysis.

The petitioners' suggestion that the Seventh Circuit caved in to a demand to recognize some far-reaching psychotherapist/privilege applicable to all mental health care providers in all contexts is completely devoid of merit on all counts. For one thing, the respondent's argument below was fact-specific. Officer Redmond, who never interjected her own state of mind as an issue into this 42 U.S.C. §1983 deadly force case, claimed a privilege with regard to confidential communications she had with a licensed clinical social worker during professional counseling sessions that followed the shooting. In their present writ, petitioners painstakingly avoid mention of certain of these specifics. For example, petitioners have studiously omitted any acknowledgement of Karen Beyer's actual professional calling and title as a licensed clinical social worker, choosing instead to gloss over her considerable (and undisputed) professional background and training by referring to her simply as "a social worker" in the hope of buttressing their contention that "mere social workers" are not worthy of privilege consideration under Rule 501. Perhaps even more disturbing is petitioners' troubling omission of the fact that all of Redmond's conversations with her counselor took place within the confines of formal, professional counseling sessions. The petitioners' "Statement" only informs that ". . . respondent Redmond had discussed the shooting with Karen Beyer, a social worker employed by the respondent Hoffman Estates," (See Petition, p. 4 et seq.) thereby conveying the impression that some, or all, of these conversations could have occurred outside the bounds of their strictly professional relationship. The record establishes otherwise.

While petitioners decry the Seventh Circuit's decision for supposedly conflicting with the law of five other circuits and for going too far in extending the privilege to mental health care providers not bearing the nomenclature "psychiatrist" or "clinical psychologist," a more-than-cursory analysis of the Court's opinion discloses several glaring instances of shortsightedness on petitioners' part. First, the Court's decision is, in actuality, quite narrow. The Seventh Circuit noted, for example, that the psychotherapist/patient privilege being recognized ". . . protects only confidential communications, i.e. all the information learned by the psychotherapist or counselor during treatment that is necessary for treatment." (A.P.W. 21, n.18.) While the Court did go on to note that the privilege extends to mental health care providers other than psychiatrists and psychologists, the Court made clear, in the same breath, that it was confining the privilege to the context of formal counseling. (A.P.W. 22-23, n.19.) Secondly, the Court explicitly limited its holding to the facts of the present case: ". . . We decline to speculate as to what situations would call for the abrogation of this privilege. Instead, we confine our analysis to a factual situation of this nature, where the balance of the competing interests tips sharply in favor of the privilege. . ." (A.P.W. 22.) Thirdly, the Court noted that the decisions emanating from other circuits that had "rejected" the privilege involved "factual situations not even remotely similar to the one before this Court." (A.P.W. 16.)

A brief review of the decisions from the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits amply bears out the Seventh Circuit's observations, and serves to highlight even more distinguishing features.

Petitioners' reliance on *Slakan v. Porter*, 737 F.2d 368 (4th Cir. 1984) to demonstrate conflict is dubious at best. First, the factual context of the case differs markedly. Interestingly, the district court in that case did recognize a privilege, albeit based on state law. Even more interesting is the Fourth Circuit's statement that ". . . the district court should have admitted the conversations pursuant to the well-settled federal rule that such communications are not privileged." *Slakan*, 737 F.2d at 377. Contrary to this off-hand remark, the rule could not have been "well settled" in the Fourth Circuit if the Court had to cite a Fifth Circuit decision as its authority. *Slakan's* own value as a statement of "well-settled" law is highly questionable. It has not been cited as authority for this particular proposition in any subsequent Fourth Circuit case.[2] Secondly, its value as precedent is rendered even more doubtful by virtue of the Fifth Circuit's own equivocation with respect to the supposed rejection of the privilege, as will be more fully developed in the next paragraph. Thirdly, the Court of Appeals found the district court's error in relying on state privilege law harmless, insofar as the evidence that was shielded by the privilege was merely cumulative and thus did not prejudice the privilege-opponent's attempt to present their case. Finally, *Slakan* was decided in 1984. As the Seventh Circuit noted in the present case, ". . . [M]uch has changed with the mental health field in the past five years." (A.P.W. 17.)

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[2] The District Court of Utah did look to *Slakan* for non-recognition of the privilege in *Parsons v. Weber County*, 151 F.R.D.130 (D.Utah, C.D. 1993), but ruled, in the case before it, that it would have been premature to decide whether a psychotherapist/patient privilege existed in its Circuit, and that such a ruling would have been unnecessary to a resolution of the case. The court further observed that, ". . . However, (the doctor) should not be questioned about communications between (another prisoner) and the doctor. Such communications could be subject to a psychotherapist/patient privilege." 151 F.R.D. at 132.

Petitioners look to *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992) for the Fifth Circuit's supposedly conflicting view. Once again, however, the factual setting of the case differs considerably, as Dr. Moore, a psychiatrist, was attempting to assert a privilege to prevent the IRS from reviewing his accounts receivable records as part of its efforts to collect over $1 million in delinquent taxes, interest, and penalties. While the Court rejected Dr. Moore's argument to adopt a doctor-patient privilege in this setting, the Court left open the possibility that the Fifth Circuit could or may recognize a privilege in a different case. 970 F.2d at 50 (". . . [T]hus, even were this Circuit to adopt a psychotherapist-patient privilege, the information sought by the summons in this case would fall outside the perimeter of its protection," citing *John Doe v. Diamond*, 964 F.2d at 1329 (2d Cir. 1992) and *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983).)[3] The panel which decided *Moore* was hesitant to overrule earlier decisions of another panel, since controlling authority dictated that this could only be decided by the full Court sitting en banc. Here, Dr. Moore did not apparently petition for such an en banc consideration or reconsideration. As a result, the *Moore* decision can hardly be characterized as embodying an unshakable rejection of the psychotherapist/patient privilege. If *Moore* represents the current state of affairs in the Fifth Circuit, all the more reason to doubt petitioners' reading of the status quo in the Fourth Circuit, as suggested in the preceding paragraph.

Petitioners next point to *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989) to illustrate conflict with the Ninth Circuit. Once again, their analysis looks right past the limited holding of that court, which focused upon the recognition of a psychotherapist/patient privilege in a criminal context. 867 F.2d at 564. Like the Fifth Circuit, the Ninth also suggests that it could or may find such a privilege applicable in other contexts, and in particular in a civil litigation setting, since the court had previously found a substantial constitutional right of privacy extending to psychotherapist-patient communications. Id. at 565. Here, the court explicitly distinguished the present case from those other settings on the grounds that it involved an investigation related to the federal crime of murder.

As for *U.S. v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994), which is presented to this Court as the Tenth Circuit's statement of position, petitioners again ignore the precise issue before the Court, which was whether to recognize a psychotherapist/client privilege in a criminal child sexual abuse context. 17.F.3d at 1301, 1302. The court did not venture beyond those parameters. Id. at 1302. Interestingly, one of the circuit judges on the panel which decided *Burtrum* was John C. Godbold of the Eleventh Circuit, sitting by designation, just as he did in the case now before the Court. Id. at 1300; see also A.P.W. 1. Had Judge Godbold felt there was no way to reconcile the Seventh Circuit's decision in *Jaffee* with the Tenth Cir-

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[3] *Doe* and *Zuniga* were both addressed by the Seventh Circuit in the present case, and are presented by the petitioners as the authorities underscoring the Second and Sixth Circuits' recognition of the psychiatrist-patient privilege.

cuit's *Burtrum* decision, surely he would have so stated in dissent.

Lastly, petitioners urge conflict with the Eleventh Circuit based on *Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992). However, once again, they have overlooked several key points. First, the evidence of past psychiatric treatment in that case was directly related to plaintiff's claims for damages because of mental anguish, anxiety, depression, and humiliation, and it was for that specific reason that the court allowed the evidence in. 967 F.2d at 467. Unlike Ms. Hancock, Officer Redmond did not, at any time, place her state of mind or of emotional well-being in issue, nor were such matters ever material to the plaintiff's limited federal claim. Secondly, while the court declined to apply any privilege in the context before it, it nonetheless acknowledged that its "... holding does not derogate the fact that Rule 501 'clearly provides federal courts with the statutory power to recognize new or novel evidentiary privileges.'" Id. at 467, n.9. Finally, the Eleventh Circuit is Judge Godbold's home circuit, and thus, he was in a unique position to develop, via a dissenting opinion, a rationale to counter that of his fellow panel members based upon his home circuit's experience in grappling with the privilege issue. However, he concurred, and in so doing, signalled that the two arguably conflicting decisions were in fact harmonious.

Thus, the premise contained in the first of petitioners' "Questions Presented" is completely undermined. While that in and of itself should suffice to turn aside the second question posed, additional justification rests in the very fact that none of the supposedly conflicting decisions of the other circuits appears to involve the question of extending the privilege to mental health care providers other than psychiatrists or psychologists. While the *Burtrum* case alone refers to the relevant actor only as a "psychotherapist," the remaining cited cases all clearly refer to psychiatrists and psychologists.

Finally, contrary to petitioners' urgings, the Seventh Circuit did not disregard this Court's cautious approach to expansion of the federal law of privilege. The Appeals Court explicitly acknowledged that "[e]videntiary privileges in litigation are not favored," citing to *Herbert v. Lando*, 441 U.S. 153 (1979), and that "Whatever their origins, these exceptions to the demand for everyman's evidence are not lightly created nor expansively construed for they are in derogation of the search for the truth," citing to *United States v. Nixon*, 418 U.S. 683 (1974). (A.P.W. 22.) But the court was likewise cognizant of this Court's statement in *Trammel v. United States*, 445 U.S.40 (1980) that Rule 501 manifests an affirmative intention not to freeze the law of privilege, but that its purpose was to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis by examining whether the privilege promotes sufficiently important interests to outweigh the need for probative evidence in the administration of justice. The Seventh Circuit's decision was clearly consistent with these principles, and should not be disturbed. Further review by this Court is not warranted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

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In The

Supreme Court of the United States

October Term, 1995

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CARRIE JAFFEE, as Special Administrator
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MARYLU REDMOND, Hoffman Estates Police Officer,
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Respondents.

◆

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

◆

JOINT APPENDIX

◆

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RELEVANT DOCKET ENTRIES

07/03/91	Complaint
08/19/91	Amended Answer of Defendant Marylu Redmond
08/19/91	Amended Answer of Defendant Hoffman Estates
03/26/92	Motion by Defendant Marylu Redmond to Quash Subpoena to Karen Beyer; file Defendant Redmond's Memorandum in Support of Motion to Quash
03/26/92	Plaintiffs' Preliminary Response to Defendant Redmond's Motion to Quash
03/26/92	Order: Defendant Redmond's Motion to Quash is Denied
04/14/92	Plaintiffs' Motion to Compel Defendant Marylu Redmond's Presence at her Continued Deposition, and to Compel Answers to Deposition Questions
04/14/92	Defendant Redmond's Objections to Plaintiffs' Motion to Compel
04/14/92	Order: Plaintiffs' motion to compel defendant Marylu Redmond's presence at her continued deposition is granted; deposition to be held on or before April 30, 1992
06/23/92	Motion by movant Karen Beyer for reconsideration of court's denial of motion to quash subpoena for deposition

06/23/92	Order: Beyer's motion for reconsideration of this court's denial of the motion to quash subpoena is denied. This Court rules orally from the bench as to the limited scope of her deposition.
09/30/92	Plaintiffs' motion to compel answers to deposition questions
09/30/92	Order: The court rules orally from the bench granting plaintiffs' motion to compel answers to deposition questions. Defendant Beyer is not required to answer questions regarding the payment issue.
11/13/92	Plaintiffs' Motion for Sanctions
11/13/92	Defendant's Response to Plaintiffs' Motion for Sanctions
12/04/92	Order: Setting hearing on plaintiffs' motion for sanctions for 12/10/92 at 9:30 a.m.
12/10/92	Order: Evidentiary hearing held and concluded; status hearing set for 01/07/93 at 8:45 a.m.
02/03/93	Plaintiffs' second motion to compel answers to deposition questions and motion to modify order of December 10, 1992
02/05/93	Order: Plaintiffs' second motion to compel answers to deposition questions is granted. Order of 12/10/92 is modified in in accordance with the court's oral ruling.

03/03/93	Plaintiffs' motion to impose sanctions on defendant Redmond
03/04/93	Order: Status hearing held. Evidentiary hearing is set for 03/08/93 at 9:30 a.m.
03/08/93	Order: Leave granted to William C. Barasha to file his appearance as counsel for non-party Karen A. Beyer. Evidentiary hearing begins. Evidence heard and concluded. Evidentiary hearing ends. Cause taken under advisement.
3/22/93	Memorandum of Law in Support of Defendant's Motion to Quash
03/26/93	Response of Karen A. Beyer, a third party witness, to plaintiffs' motion to impose sanctions on defendant Marylu Redmond and/or defendant Village of Hoffman Estates,
04/06/93	Order granting plaintiffs' motion to impose sanctions on defendant Redmond and said defendant is precluded at trial from testifying as to her version of the event because plaintiffs' attorneys have been blocked from effective cross examination The matter as to non party Beyer is referred to the US Attorney's office for possible criminal contempt proceedings under FRCP 42(b)
04/12/92	File memorandum opinion
12/08/93	Defendants' motion to reconsider, December 6, 1993
12/10/93	Order granting defendant's motion to reconsider and to vacate its order entered 4/6/93 to a limited extent pursuant to this court's oral

	ruling.
12/13/93	Trial begins
12/22/93	Trial concludes; verdict for plaintiff Carrie Jaffee and against defendants' Marylu Redmond and Village of Hoffman Estates. Jury returns its verdict finding in favor of plaintiff Carrie Jaffee and against defendant Mary Lu Redmond and assessing damages in the amount of $45,000 on the first claim and finding in favor of plaintiffs Carrie Jaffee and Brandon Allen and against defendants Mary Lu Redmond and the Village of Hoffman Estates and assessing damages in the amount of $500,000 on the second claim. Jury polled. Jury discharged. Trial ends. Enter judgment on the verdict.
12/22/93	Enter judgment
01/19/94	Notice of appeal filed by Mary Lu Redmond, Village of Hoffman Estates

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

COMPLAINT

Plaintiffs Carrie Jaffee, as Special Administrator for Ricky Allen, Sr., deceased, and Plaintiff Lechia Allen, Next Friend of Ricky Allen, Jr., and Brandon Allen, allege as follows:

COUNT I

1. Count I of this complaint arises under 42 U.S.C. §1983. The jurisdiction of this Court is conferred by 28 U.S.C. 1343.

2. Plaintiff Carrie Jaffee is a resident of the Northern District of Illinois and maintains this action pursuant to Ill.Rev.Stat. ch. 110, 12-1008 as Special Administrator for Ricky Allen, Sr., deceased.

3. Plaintiff's decedent Ricky Allen, Sr. was born in 1960 and died on June 27, 1991, as a result of the wrongful acts of Defendant Redmond, as described with greater specificity below. Plaintiff's decedent is survived by his mother, Carrie Jaffee, and by his two minor children, Ricky Allen, Jr. and Brandon Allen.

4. Defendant Marylu Redmond was at all times relevant acting under color of her employment as a police officer of the Village of Hoffman Estates, Illinois.

5. Defendant Hoffman Estates is a municipal corporation of the State of Illinois and is joined in this action in Count II pursuant to

28 U.S.C. § 1367(a).

6. On June 27, 1991, at or about 12:00 noon, while engaged in the course of her official duties as a police officer of the Village of Hoffman Estates, Defendant Redmond responded to a call of a disturbance at the Canyon Estates Apartments in Hoffman Estates.

7. Shortly after arriving at the Canyon Estates Apartments, Defendant Redmond shot and killed Plaintiff's decedent Ricky Allen, Sr.

8. In June of 1991, it was clearly established law that a police officer could not, consistent with the Fourth and Fourteenth Amendments to the Constitution of the United States, use deadly force other than when necessary to prevent death or great bodily harm.

9. At the time she came upon Plaintiffs decedent Ricky Allen, Sr., Defendant Redmond knew, or should reasonably have known, that her use of deadly force was not necessary to prevent death or great bodily harm.

10. The above described actions of the Defendant Redmond caused Plaintiff's decedent, Ricky Allen, Sr., to be deprived of his rights secured by the Fourth and Fourteenth Amendments to the Constitution of the United States, not to be subjected to unreasonable seizures and not to be deprived of life without due process of law.

COUNT II

11. Count 11 of this complaint is a wrongful death action arising under Ill. Rev. Stat. ch. 70, par. 1 et seq..

12. Plaintiff Jaffee restates and realleges paragraphs 2-10 of Count I of this complaint.

13. At all times relevant, there has been in force and effect a statute of the State of Illinois known as Ill. Rev. Stat. ch. 38, par. 7-5 entitled "Peace officer's use of force in making arrest," which provides in pertinent part that a police officer:

> [I]s justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to

> himself or such other person, or when he reasonably believes both that:
>
> (1) Such force is necessary to prevent an arrest from being defeated by resistance or escape; and
>
> (2) The person to be arrested has committed or attempted a forcible felony which involves the infliction or threatened infliction of great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

14. At the time she came upon Plaintiff's decedent, Defendant Redmond was not seeking to arrest Plaintiff's decedent and Defendant Redmond knew, or reasonably should have known, that her use of deadly force was not necessary to prevent death or great bodily harm.

15. At all times relevant, there has been in force and effect a statute of the State of Illinois known as Ill. Rev. Stat. ch. 38 par. 7-1 entitled "Use of force in defense of person," which provides in pertinent part that a person:

> "[I]s justified for use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony."

16. At the time she came upon Plaintiff's decedent, Defendant Redmond knew or reasonably should have known that her use of deadly force was not necessary to prevent imminent death or great bodily harm to another individual or herself or to prevent the commission of a forcible felony.

17. Notwithstanding the facts set out above, Defendant Redmond shot and killed Plaintiff's decedent, thereby causing his death.

18. The action of Defendant Redmond constituted willful and wanton conduct, in that Defendant Redmond acted in utter indifference to rights secured to Plaintiff's decedent by the law of the State of Illinois and by the Fourth and Fourteenth Amendments to the Constitution of the United States.

19. The actions of Defendant Redmond described above were undertaken in the course of, and within the scope of, her employment as a police officer of Defendant Village of Hoffman Estates, Illinois.

20. Plaintiff's decedent exercised due care at all times material and relevant to this complaint.

21. Each and every beneficiary and next of kin of the decedent exercised due care at all times relevant and material to this Complaint.

22. At the direction and proximate result of the willful and wanton acts of Defendant Redmond causing the death of Plaintiff's decedent, the next of kin of Plaintiff's decedent have sustained substantial pecuniary loss and damage.

COUNT III

23. Count III of this Complaint arises under 42 U.S.C. § 1983. The jurisdiction of this Court is conferred by 28 U.S.C. 1343.

24. Plaintiff Lechia Allen maintains Count III as the next friend of her minor children, Ricky Allen, Jr., and Brandon Allen, who also are the children of Ricky Allen, Sr.

25. Plaintiff Allen realleges paragraphs 4-8 of Count 1.

26. At the time she came upon Ricky Allen, Sr., Defendant Redmond knew, or should reasonably have known, that her use of deadly force was not necessary to prevent death or great bodily harm.

27. The actions of the Defendant Redmond caused Ricky Allen, Jr., and Brandon Allen, without due process of law, to be wrongfully deprived of their right secured by the Fourteenth Amendment to the United States Constitution, to associate with their father, Ricky Allen, Sr.

JURY DEMAND

28. Plaintiffs hereby demand trial by jury for all claims.

WHEREFORE Plaintiffs pray that judgment be entered in their favor against Defendants Redmond and the Village of Hoffman Estates in an amount in excess of $1,000,000.00.

/s/ Kenneth N. Flaxman
one of the attorneys for plaintiffs

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attorneys for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

AMENDED ANSWER

NOW COMES defendant MARYLU REDMOND, by and through her attorneys, SEGAL MCCAMBRIDGE SINGER & MAHONEY, LTD., and in answer to plaintiffs' Complaint states as follows:

COUNT I

1. Defendant denies that plaintiff has any meritorious claim against her arising under 42 U.S.C. 1983. Defendant does not contest the jurisdiction of this Court.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of 12 and on that basis denies same.

3. Defendant denies that Ricky Allen, Sr., died as a result of any wrongful act of this defendant; defendant admits that Ricky Allen was born in 1960 and that he died on June 27, 1991; defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of par. 3, and on that basis denies same.

4. Defendant admits the allegations of par. 4.

5. Defendant admits that Hoffman Estates is an Illinois municipal corporation, but makes no answer to the remaining allegations of par. 5 which pertains solely to co-defendant Village of Hoffman Estates.

6. Defendant admits the allegations of par. 6.

7. Defendant admits the allegations of par. 7.

8. Defendant denies that the allegations set forth in par. 8 completely set forth the applicable clearly established law, as of June 1991, with regard to a police officer's use of deadly force.

9. Defendant denies the allegations and conclusions of par. 9.

10. Defendant denies the allegations and conclusions of par. 10.

COUNT II

11. Defendant denies that plaintiff has any meritorious claim against her arising under the statutory provision cited.

12. Defendant restates her answers to pars. 2-10 of Count I as her answers to this paragraph, as though fully set forth herein.

13. Defendant admits the existence of the statute cited, which speaks for itself.

14. Defendant denies the allegations of par. 14.

15. Defendant admits the existence of the statute, which speaks for itself.

16. Defendant denies the allegations and conclusions of par. 16.

17. Defendant admits that she shot and killed plaintiff's decedent, but denies that this was done "[N]otwithstanding the facts set out above ..."

18. Defendant denies the allegations and conclusions of par. 18.

19. Defendant admits that her actions were undertaken in the course of, and within the scope of her employment as a police officer of Hoffman Estates.

20. Defendant denies the allegations of par. 20.

21. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of par. 21 and on that basis denies same,

22. Defendant denies the allegations of par. 22.

COUNT III

23. Defendant denies that plaintiff has any meritorious claim against her under 42 U.S.C. §1983. Defendant does not contest this Court's jurisdiction.

24. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of par. 24 regarding the relationship of Lechia Allen, Ricky Allen, Jr., and Brandon Allen, and Ricky Allen, Sr. and on that basis denies same.

25. Defendant restates her answers to pars. 4-8 of Count I as her answer to this paragraph, as though fully set forth herein.

26. Defendant denies the allegations and conclusions of par. 26.

27. Defendant denies the allegations and conclusions of par. 27.

WHEREFORE, defendant MARYLU REDMOND denies that plaintiffs are entitled to judgment against her in any amount whatsoever. Defendant prays that judgment be entered in her favor, and against the plaintiffs, dismissing plaintiff's complaint and awarding defendant her costs.

/s/ Gregory E. Rogus
Attorneys for Defendant

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

MOTION TO QUASH

NOW COMES defendant MARYLU REDMOND, through counsel, and hereby moves this Honorable Court to quash a certain subpoena issued by plaintiffs' counsel, for deposition and for production of certain records, and in support of this motion states as follows:

1. The present lawsuit involves claims of deprivation of various constitutional rights and for wrongful death under Illinois state law arising from the death of Ricky Allen on June 27, 1991. Defendant MaryLu Redmond is a police officer for the Village of Hoffman Estates. The plaintiffs contend that Officer Redmond utilized unconstitutional excessive force, and engaged in wilful and wanton misconduct, in shooting Ricky Allen on the aforesaid date.

2. At her deposition, Officer Redmond testified that subsequent to the June 27, 1991 incident, she received counseling from Karen Beyer, who is the Director of Health and Human Services for the Village of Hoffman Estates. Plaintiffs' attorney then inquired into the content of any conversations or discussions between officer Redmond and Ms. Beyer, and defendant's attorney interposed objection based upon the privileged nature of any communications between the officer and Ms. Beyer.

3. Plaintiffs' counsel has now issued a subpoena directed to Ms. Beyer, copy of which is attached hereto as Exhibit A. The subpoena commands Ms. Beyer to appear and to testify at deposition, and to produce and permit inspection and copying of, *inter alia*, "... all notes, records, reports, pertaining to MaryLu Redmond."

4. As the affidavit of Karen Beyer, attached hereto as Exhibit B, demonstrates, the only communications between Officer Redmond and Ms. Beyer occurred after the incident and within the context of the counseling relationship. Furthermore, Ms. Beyer did not witness the incident, nor does she have any first-hand knowledge of any of the events which occurred at the scene of the incident on the date of the incident.

5. The plaintiffs' subpoena invades the confidentiality attendant to those communications between the officer and her counselor and infringes upon Officer Redmond's right to privacy and her reasonable expectation that those communications remain confidential.

6. Defendant respectfully submits that any and all communications between Officer Redmond and Ms. Beyer, and any and all "notes, records, reports pertaining to MaryLu Redmond" are privileged, under applicable law, from disclosure since such communications took place within the setting of a professional counseling relationship.

7. Defendant therefore ask this Court to quash said subpoena.

8. In support of this motion, defendant submits herewith her Memorandum of Law.

/s/ Gregory E. Rogus
an attorney for defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

AFFIDAVIT

KAREN BEYER, being first duly sworn, on oath deposes and states as follows:

1. I have personal knowledge of the matters set forth in this affidavit, and I am competent to testify to these matters.

2. I am a licensed clinical social worker. I received my Masters Degree in social work from Loyola University of Chicago. I am also a certified employee assistance counselor.

3. I am employed by the Village of Hoffman Estates. My title is Director of Health and Human Services.

4. The only conversations or contact I have had with Ms. MaryLu Redmond since June 27, 1991 have been in my professional capacity as a licensed clinical social worker and certified employee assistance counselor and have pertained to my provision of counseling and counseling services to Ms. Redmond.

5. I was not present at the Grand Canyon Estates Apartments at any time on June 27, 1991, nor did I witness any shooting, nor any events pertaining to any shooting, at that address on that date.

/s/ Karen Beyer

[jurat omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO QUASH

Defendant, MARYLU REDMOND, through her attorneys, submits the following arguments and authorities in support of her motion to quash the subpoena issued by plaintiffs' attorney directed to Karen Beyer.

Background

The plaintiffs have brought a three count Complaint at Law against the Village of Hoffman Estates and one of its police officers, Marylu Redmond, arising out of the shooting death of plaintiffs' decedent, Ricky Allen, on June 27, 1991. In Count I, the plaintiff alleges that Officer Redmond utilized unconstitutional excessive force, thereby violating the decedent's Fourth Amendment right to be free from unreasonable seizure and Fourteenth Amendment right not to be deprived of life without due process of law. Recovery is sought pursuant to 42 U.S.C. §1983. In Count II, the plaintiffs contend that Officer Redmond's conduct was wilful and wanton and amounted to utter indifference to the rights of Ricky Allen. Plaintiffs seek recovery in this count pursuant to Illinois' Wrongful Death Act. Finally, in Count III, plaintiffs assert a Fourteenth Amendment claim for deprivation of the rights of two of the decedent's children to associate with their father.

Officer Redmond appeared and testified at deposition on January 15, 1992, and again on January 21, 1992. In response to questions posed by plaintiffs' attorney, the defendant stated that she has been undergoing counseling following the shooting, and that her counselor is Karen Beyer, who is employed as the Director of Health and Human Services for the Village of Hoffman Estates. As shown in the affidavit submitted in conjunction with the present motion, Ms. Beyer is a licensed clinical social worker, holding a

Masters Degree in Social Work from Loyola University of Chicago. She is also certified as an employee assistance counselor.

At the deposition, plaintiffs' attorney sought to inquire into conversations between Ms. Redmond and Ms. Beyer. Defendant's attorney objected on the grounds that any such conversations or communications between the two were privileged.

Plaintiff's attorney has now issued a subpoena directed to Ms. Beyer commanding her to appear and to testify at deposition, and to produce and permit inspection and copying of, *inter alia*, " ... all notes, records, reports pertaining to Marylu Redmond." The defendant objects to any such attempt to invade the confidential nature of Ms. Redmond's professional relationship with Ms. Beyer and the communications taking place within the context of that relationship.

In her affidavit, Ms. Beyer states that the only conversations or contact she has had with Ms. Redmond since June 27, 1991 have been in her professional capacity as a licensed clinical social worker and certified employee assistance counselor, and have pertained to her provision of counseling and counseling services to Ms. Redmond. Furthermore, Ms. Beyer was not a witness to, nor does she have any first-hand knowledge of any of the events surrounding the June 27, 1991 shooting.

Defendant respectfully contends that her conversations and communications with Karen Beyer are privileged by law against disclosure. since the subpoena clearly manifests plaintiff's intent to probe into matters which are so privileged, defendant is moving this Court to quash said subpoena.

Arguments and Authorities

The starting point for determining the legal basis of defendant's claim of privilege is Rule 501 of the Federal Rules of Evidence, which states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with state law.

The Historical Note to this rule indicates that the initial bill submitted for consideration by the Congress contained thirteen rules addressing the matter of privileges. While none of these specifically articulated a counselor-client privilege or a social-worker-client privilege, there was an analogous psychotherapist-patient privilege defined in proposed Rule 504. Ultimately, however, Congress opted to eliminate these specific rules and to provide, instead, for a single general rule governing privileges in the courts of the United States. Congress' election in this regard, though, was not intended to preclude recognition of specific privileges. Rule 501 instructs federal courts that recognition of a privilege "shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in light of reason and experience. Thus, rather than precluding the recognition of ... a privilege, Rule 501 'envisions the flexible development of the federal common law of privilege on a case-by-case basis."' *Sabree v. United Brotherhood of Carpenters and Joiners of America, Local No. 33*, 126 F.R.D. 422 at 424 (D.C.Mass. 1989) (citing *In re Production of Records to Grand Jury*, 618 F.Supp. 440, 442 (D.C.Mass. 1985) quoting *United States v. Gillock*, 445 U.S. 360, 367, 100 S.Ct. 1185, 1190, 63 L.Ed.2d 454 (1980). With reference to the psychotherapist-patient privilege, the District Court in *Sabree* further noted, quoting Senate Report No. 93-1277:

> It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient .... or any other of the enumerated privileges contained in the Supreme Court Rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege

> *based on a confidential relationship and* other privileges should be determined on a case-by-case basis.

Sabree, 126 F.R.D. at 424, 425 (emphasis added).

Of additional significance under the Historical Note is the Conference Committee's adoption of the House version of Rule 501, which required the application of state privilege law in civil actions and proceedings where the rule of decision as to a claim or defense is supplied by state law, as opposed to the Senate version, which called for greater restriction on the applicability of state privilege law.

In the present non-diversity case, the plaintiffs are pursuing claims under both federal and state substantive law. It would appear, in light of the Conference Committee's action, that state privilege law should be applied to plaintiffs' state law claim, and federal common law to the federal claim. While this might, in other contexts, present a serious dilemma, defendant respectfully contends that none is posed here, since the interests to be addressed and those sought to be protected are equivalent within the framework of both the federal and state claims being asserted. Therefore, while the mechanism for arriving at a determination of recognized privilege may differ somewhat with regard to plaintiff's different claims, the result should be, and is, the same.

Given plaintiff's assertion of a claim under Illinois' Wrongful Death Act coupled with the allegation of "wilful and wanton" misconduct under state law, consideration must be given to Illinois law governing the issue of privilege. once again, the communications sought to be protected from disclosure are those between an individual and a counselor/clinical social worker occurring within the counseling setting. The applicable rule is clearly stated in the Illinois Mental Health and Developmental Disabilities Confidentiality Act, S.H.A. ch. 91½ §800 et. seq.

Section 10(a) of the Act (S.H.A. ch. 91½, §810(a)) states, in pertinent part, as follows:

> Except as provided herein, in any civil, criminal, administrative, or legislative proceeding, or in any proceeding preliminary thereto, a recipient, and a therapist on behalf and in the interest of a recipient, has the privilege to refuse to disclose and to prevent the disclosure of the recipient's record or communications.

The Act provides the following definitions in §2 (S.H.A. ch. 91½ § 802):

> (1) "Confidential communication" or "communication" means any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient. Communication includes information which indicates that a person is a recipient ...
>
> (3) "Mental health or developmental disability services" or "services" includes, but is not limited to, examination, diagnosis, evaluation, treatment, training, pharmaceutical, aftercare, habilitation, or rehabilitation ...
>
> (6) "Recipient" means a person who is receiving or has received mental health or developmental disabilities services ...
>
> (7) "Record" means any record kept by a therapist or by an agency in the course of providing mental health or developmental disabilities services to a recipient concerning the recipient and the services provided. Record does not include the therapist's personal note if such notes are kept in the therapist's sole possession for his own personal use and are not disclosed to any other person, except the therapist's supervisor, consulting therapist, or attorney. If at any time such notes are disclosed, they shall be considered part of the recipient's record for purposes of this Act ...
>
> (9) "Therapist" means a psychiatrist, physician, psychologist, social worker, or nurse providing ment health or developmental disabilities services *or any other person not Prohibited by law from providing su services or from holding himself out as a therapist* if the recipient reasonably believes that such person is permitted to do so . . .

(emphasis added)

Finally, regarding a therapists "personal notes", the Act goes on to provide, at § 3 (ch. 91½ § 803):

> (a) All records and communications shall be confidential and shall not be disclosed except as provided in this Act.
>
> (b) A therapist is not required to, but may, to the extent he determines it necessary and appropriate, personal notes regarding a recipient. Such personal notes are the work product and personal property of therapist and shall not be subject to discovery in judicial, administrative, or legislative proceeding any proceeding preliminary thereto.

The foregoing statutory definitions and prohibitions clearly applicable to the present case. Marylu Redmond is a "recipient" of "mental health or developmental disability services" from Karen Beyer, a "therapist." Therefore, both Officer Redmond, and Ms. Beyer have the privilege to refuse to disclose and to prevent the disclosure of Ms. Redmond's record and/or her communications with Ms. Beyer. Additionally, Ms. Beyer's notes, if any, are not subject to discovery nor to disclosure. None of the exceptional provisions of the Act apply.

Consideration of the Illinois case law construing this Act lends persuasive and compelling reinforcement to its applicability to the present case. In *House v. Swedish American Hospital* 206 Ill.App. 3d 437, 564 N.E.2d 922 (2d Dist. 1990), the Appellate Court stated that the purpose of the Mental Health Act is to protect the confidentiality of the records and communications of those persons receiving mental health services, and that this general prohibition against disclosure of this information was enacted to protect the patient's privacy rights, along with providing an inducement to seek such treatment. *House*, 564 N.E.2d at 926. The Court went on to hold that certain hospital records pertaining to psychiatric admissions were not discoverable.

In *In re Marriage of Semmler*, 90 Ill.App.3d 649, 413 N.E.2d 502 (2d Dist. 1980), the Court held that a "clinical family therapist" was a therapist within the meaning of the Act. Therefore, certain statements made to that therapist by one spouse in a

professional consultation were privileged from disclosure at the behest of the other spouse during divorce proceedings in court.

In *Martino v. Family Service Agency of Adams County*, 122 Ill.App.3d 593, 445 N.E.2d 6 (4th Dist. 1983), the Appellate Court held that marriage counseling is included within the purview of confidentiality. Citing *Semmler*, the Court noted that "... This interpretation of the Confidentiality Act is consistent with the recommendations of the 1976 Report of the Governor's commission for Revision of the Mental Health Code of Illinois chaired by the Honorable Joseph Schneider of the Circuit Court of Cook County. This report introduced the proposed Confidentiality Act by stating that it *was intended to include all those persons entering into a therapeutic relationship with clients...*" *Martino*, 445 N.E.2d at 11. (emphasis added) The *Martino* Court also pointed out that the Illinois Social Workers Registration Act (S.H.A. ch. 111 § 6324) prohibits a social worker from disclosing any information he may have acquired from persons consulting him in his professional capacity which was necessary to enable him to render services in that capacity to those persons. *Martino*, 445 N.E.2d at 10. While the particular statutory provision has since been repealed, the legislature has enacted a new Clinical Social Work and Social Work Practice Act (S.H.A. ch. 111, § 6351 et. seq.) which continues the prohibition in effect and expressly incorporates in its entirety the Mental Health and Developmental Disabilities Confidentiality Act. (See S.H.A. ch. 111, § 6366.)

Finally, in *People v. Saastetter*, 177 Ill.App.3d 982, 532 N.E.2d 1029 (2d Dist. 1988), the Act was applied to communications between a criminal defendant and a "master clinician" from a mental health community center. Particularly noteworthy in this case is the court's observation that the fact that defendant was receiving help for his mental problems in no way indicates that he was making his mental condition a defense to the charges against him.

In the present case, any contention or suggestion that Officer Redmond has somehow introduced her own mental condition or any aspect of the counseling services received from Karen Beyer for such condition as an element of her defense must be uncategorically rejected. It is the plaintiffs who are here attempting to unjustifiably pry into and make an issue out of t officer's counseling relationship with Ms. Beyer. As amply shown, it is exactly such attempts against which the Act was designed to protect.

In sum, Officer Redmond is clearly entitled, as a matter o state law, to refuse to disclose and to prevent the disclosure her communications with Karen Beyer.

With respect to those claims asserted by plaintiffs under federal law, defendant readily acknowledges, under Rule 501, that it is not the state law of privilege which controls, but rather the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, as the Seventh Circuit has stated, this does not mean that federal courts should not consider the law o the state in which the case arises in determining whether a privilege should be recognized as a matter of federal law. A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy. And where a state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule. *Memorial Hospital for McHenry County v. Shadur,* 664 F.2d 1058, 1061 (7th Cir. 1981), citing *United States v. King,* 73 F.R.D. 103, 105 (E.D.N.Y. 1976) and *Lora v. Board of Education,* 74 F.R.D. 565 (E.D.N.Y. 1977).

In making the case-by-case determination regarding recognition of privileges, the Seventh Circuit has utilized a balancing approach, weighing the need for truth against the importance of the relationship or the policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case. *Jennings v. D.H.L. Airlines,* 101 F.R.D. 549, 550 (N.D.Ill. 1984), citing *Ryan v. I.R.S.,* 568 F.2d 531, 543 (7th Cir. 1977). Under this approach, the District Court in Jennings granted a plaintiff's motion to quash a subpoena directed by the defendant to plaintiff's psychologist. Judge Marshall there recognized the critical importance of confidentiality with regard to communications between a therapist and patient:

> "... The relationship at stake here is the relationship between a psychotherapist and his patient. The policy

> which underlies the privilege is that 1[u]nlike the patient with physical complaints who will consult a physician regardless of whether confidentiality is guarantee, a neurotic or psychotic individual may seek help only if he is assured that his confidences will not be divulged, even in a courtroom.' (citation omitted) In this case, knowledge that disclosure of confidential information would occur would likely have damaged plaintiff's relationship with her psychologist ... Had she known that (the psychologist) might be required to disclose her confidences in a lawsuit...her trust in (the psychologist) doubtless would have diminished."

Jennings, 101 F.R.D. at 550, 551.

While it is true that the federal cases cited herein do not speak specifically of a "licensed clinical social worker-client" or a "counselor-client/patient" relationship, there is no legitimate logical reason to disassociate the principles and the reasoning of those cases from the present context. The important factors to consider are the therapeutic function being served and the therapeutic nature of the relationship, and not simply the labels attached to the individuals involved. While Karen Beyer may not technically be a psychologist nor a psychiatrist, she is nonetheless a professional to whom Officer Redmond reasonably turned to obtain counseling following a difficult episode in her own professional life. The state of Illinois has seen fit to encourage such efforts to pursue appropriate measures aimed at the restoration and/or maintenance of sound mental/emotional health, and to protect the confidences of those persons undertaking such measures for their well-being. Federal courts should do likewise.

This is not to belittle the importance of the Court's fact finding function, nor to suggest little regard for the "need for truth", but only to strike the proper balance. Recognition of the privilege asserted in this case will not, unlike the *Memorial Hospital for McHenry County* case, prevent the plaintiffs from otherwise establishing their claim, since plaintiff's claim does not arise out of the communications or information being sought via the subpoena but rather from an event or occurrence which exists independently of those matters. See *Memorial Hospital,* 664 F.2d at 1062, 1063.

Conversely, failure to recognize the privilege will utterly destroy the relationship between Officer Redmond and her counselor and obliterate whatever good has and will come of that relationship.

Conclusion

Based on the foregoing, defendants respectfully move for entry of an order quashing the subpoena directed to Karen Beyer.

/s/ Gregory E. Rogus
Attorneys for Defendant

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFFS' PRELIMINARY RESPONSE TO DEFENDANT REDMOND'S MOTION TO QUASH

Plaintiff has subpoenaed records maintained by Karen Beyer, the Director of Health and Human Services of defendant Village of Hoffman Estates. Ms. Beyer, a licensed clinical social worker and certified employee assistance counselor, has met with defendant Redmond for 90 minute sessions two or three times a week, starting sometime after Redmond killed plaintiff's decedent Ricky Allen. Defendant Redmond, who is on medical leave because she is psychologically unfit to work as a police officer, has moved to quash the subpoena.

Redmond's motion to quash raises several questions:

1. Should the Court recognize a therapist-patient privilege? Compare *In re Zuniga,* 714 F.2d 632, 639 (6th Cir. 1983) (recognizing privilege) with *United States v. Corona,* 849 F.2d 562, 567 (11th Cir. 1988) (refusing to recognize privilege).

2. If the Court does recognize a therapist-patient privilege, should the privilege extend beyond Proposed Federal Rule of Evidence 504, which limited the privilege to physicians and licensed or certified psychologists? See *Cunningham v. Southlake Center for Mental Health,* 125 F.R.D. 474, 477 (N.D.Ind. 1989) (stating that while Seventh Circuit would recognize therapist-patient privilege, the "privilege should not be extended beyond the parameters of proposed Rule 504 to social workers." *Compare Jennings v. D.H.L. Airlines,* 101 F.R.D. 549, 550-51 (N.D.Ill. 1984) (applying privilege to a clinical psychologist).

3. If the Court recognizes a privilege for counseling sessions conducted by a licensed clinical social worker and certified employee assistance counselor who is also the an employee of defendant Village of Hoffman Estates, disposition of the motion to

quash turns on a balancing of the competing interests. *See Lora v. Board of Education of City of New York*, 74 F.R.D. 565 (S.D.N.Y. 1977).

A fair disposition of the balancing of interests requires an expanded record. There are a variety of factors in the background of defendant Redmond, as well as in the way she has acted following the shooting, that make evidence about her post-incident counselling sessions of crucial relevance to her credibility and to her ability to recall. Accordingly, if the Court is of the opinion that disposition of defendant's motion turns on a balancing of competing interests, plaintiff requests leave to file (under seal) an evidentiary submission by April 6, 1992.

Respectfully submitted,

/s/ Kenneth N. Flaxman
an attorney for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFFS' MOTION TO COMPEL DEFENDANT MARYLU REDMOND'S PRESENCE AT HER CONTINUED DEPOSITION, AND TO COMPEL ANSWERS TO DEPOSITION QUESTIONS

Plaintiffs, by counsel, request that the Court enter an Order compelling defendant Redmond to appear at her continued deposition to answer questions concerning conversations with Karen Byer.

As grounds for this motion, plaintiffs state as follows:

1. Plaintiffs brought this lawsuit to seek damages for the June 27, 1991 shooting death of Ricky Allen, Sr., by Hoffman Estates, Illinois police officer MaryLu Redmond.

2. Written discovery in the case commenced shortly after filing of the lawsuit in early July 1991.

3. When deposed on January 21, 1992, defendant Redmond was asked a series of questions concerning her conversations with Karen Byer, a social worker employed by defendant Village of Hoffman Estates, Illinois.

4. Defendant Redmond asserted a privilege to these questions and refused to answer. (See relevant testimony attached as Exhibit A)

5. In its oral opinion of March 26, 1992, this Court ruled that conversations between Redmond and Byer are not privileged.

6. In light of the Court's ruling, plaintiffs have sought to recommence Redmond's deposition. (See Exhibit B, attached)

7. Redmond has refused to return and answer questions. (See Exhibit C, attached)

8. A telephone conference between counsel has failed to resolve this disagreement.

WHEREFORE, plaintiffs request that this Court enter an Order compelling defendant Redmond to appear on Thursday, April 23, at 10:00 a.m. at the offices of Futterman & Howard, 122 South Michigan, Suite 1850, Chicago, Illinois, or any other such date and time as the Court deems appropriate, and to answer questions about her conversations with Byer.

DATED: April 8, 1992

/s/Jennifer K. Soule
one of the attorneys for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

DEFENDANT'S OBJECTION TO PLAINTIFF'S MOTION TO COMPEL

NOW COMES defendant MARYLU REDMOND, through her attorneys SEGAL MCCAMBRIDGE SINGER & MAHONEY, LTD., and hereby objects to the plaintiffs' "Motion to Compel Defendant MaryLu Redmond's Presence at Her Continued Deposition, And To Compel Answers to Deposition Questions," for the reasons set forth below.

1. In their motion, the plaintiffs seek to reconvene the deposition of defendant MaryLu Redmond for the purpose of inquiring into communications between Ms. Redmond and Karen Beyer. These communications had been the subject of a separate, though related, attempt by the plaintiffs to procure, through subpoena, certain records and testimony from Karen Beyer. Plaintiffs claim, as their authority for proceeding with the present motion, this Court's oral ruling of March 26, 1992, which denied defendant's notion to quash that subpoena. A copy of the transcript of proceedings before this Court on that date is attached hereto as Exhibit A.

2. It is true, as the plaintiffs have shown through the Exhibits attached to their motion, that this defendant has asserted a privilege against disclosure with respect to the aforesaid communications. Defendant hereby reasserts that privilege and incorporates the arguments and authorities presented in defendant's previously filed Motion to Quash and Memorandum of Law in Support of Defendant's Motion to Quash, in objecting to the present motion.

3. Notwithstanding this Court's oral pronouncement on the issue of privilege, defendant respectfully submits that the plaintiffs are, nevertheless, not entitled to the relief sought in the present motion.

4. The Court's March 26, 1992 ruling rested upon the premise that the federal claim embodied in plaintiffs' lawsuit is the one that would basically control issues of admissibility (which are of course closely linked up with issues of discoverability.) (See transcript, p. 2)

5. The federal claim which plaintiffs are asserting in the present case alleges the use of excessive force by an individual law enforcement officer. (See Complaint, Counts I and III, attached hereto as Exhibit B.)

6. Under the Supreme Court's holding in *Graham v. Connor,* U.S._, 109 S.Ct. 1865 (1989), all claims that law enforcement officials have used excessive force — whether deadly or not — in the course of an arrest, investigatory stop, or other "seizure" are to be analyzed under the Fourth Amendment's objective reasonableness standard. Under this standard, the inquiry focuses upon whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him/her, without regard to underlying intent or motivation. The reasonableness of a particular use of force is to be judged from the perspective of a reasonable officer on the scene, taking into consideration that police officers are often forced to make split-second judgements in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation. Hindsight is inappropriate to the analysis. Subjective motivation and intent are not to be considered.

7. Given this standard, it is the objective reasonableness of Officer Redmond's conduct at the time of the shooting upon which the trier of fact must focus in determining whether any federal constitutional violation occurred which would entitle the plaintiffs to money damages or other relief.

8. The plaintiffs, through counsel, have now stated their intention to this Court to utilize any information which they seek in connection with these privileged communications to possibly consult a clinical psychologist for evaluative purposes. (See transcript, Ex. A, p. 8) Defendant contends that any such "evaluation" would be improper and inadmissible, given the parameters of relevancy established by Graham.

9. Furthermore, privilege or no, there is no question that whatever communications have occurred between defendant and Karen Beyer were, at a minimum, sensitive. In *Powers v. Chicago Transit Authority,* 846 F.2d 1139 (7th Cir. 1988), our Court of Appeals instructed that "... district courts have a responsibility to protect sensitive information in discovery, where the utility of that information is less than the injury its disclosure may do, *even if the information is not technically privileged.*" 846 F.2d at 1143. (emphasis added)

10. In the present case, disclosure of communications between the defendant and Ms. Beyer would be injurious in the extreme — it would totally destroy a professional, therapeutic relationship which is completely dependent upon the maintenance of confidentiality in order to achieve its unquestionably useful and desirable, and legally protected goal of fostering, restoring, and/or maintaining sound mental/emotional health and well-being.

11. On the other hand, the utility of information to be obtained should plaintiff be allowed to pry into these confidential communications is, at best, highly doubtful in light of *Graham,* and certainly "less than the injury its disclosure may do." The officer has already provided lengthy, detailed deposition testimony. The existing record of this case is voluminous, and discovery is ongoing with regard to purported eyewitness accounts of events, facts, and circumstances pertaining to this incident, the sum total of which will provide a more than ample testing of the objective reasonableness of Officer Redmond's conduct in the face of those facts and circumstances.

For these reasons, defendant objects to plaintiff's efforts to reconvene her deposition and respectfully requests that the Court deny plaintiff's motion to compel.

/s/ Gregory E. Rogus
an attorney for defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

KAREN BEYER'S MOTION FOR RECONSIDERATION OF COURTIS DENIAL OF MOTION TO QUASH SUBPOENA FOR DEPOSITION

Now comes KAREN BEYER, LCSW, CEAP, by her attorneys, Sandra G. Nye and Associates, and for her Motion for Reconsideration of the Court's denial of the Motion to Quash Subpoena heretofore filed by Defendants herein, states as follows:

1. KAREN BEYER, LCSW, CEAP, is a Licensed Clinical Social Worker in the State of Illinois, and a Certified Employee Assistance Professional. Through the Employee Wellness Program of the Village of Hof fman Estates, she is and has been a psychotherapist providing psychotherapy services to MARY LU REDMOND, Defendant.

2. The Employee Wellness Program is an "employee assistance program" providing physical and psychological health services to employees of the Village. A copy of the Supervisor's Manual describing the program is appended hereto, designated Exhibit A, and by this reference incorporated herein. 2. Said BEYER has been served with a Subpoena to appear and give deposition testimony and produce her clinical records in the within cause. A copy of the said Subpoena is appended hereto, designated Exhibit B, and by this reference incorporated herein.

3. Defendants moved to quash the said Subpoena, asserting a privilege pursuant to Rule 501 of the Federal Rules of Evidence and Ill.Rev.Stat., ch. 91½, pars. 802, 803 and 810.

4. By ruling on March 26, 1992, this Court denied the Motion to Quash citing the standards set forth in Proposed Rule 504, which defines "psychotherapist" as a psychiatrist or psychologist, and referring to the discussion in Weinstein at pages 504-03 at 504-17-19 and 504-05 at 504-24.

5. BEYER has an affirmative duty arising out of her fiduciary duty to her patient, Defendant MARY LU REDMOND, the Code of Ethics of the National Association of Social Workers (NASW), and the Code of Professional Conduct of The Employee Assistance Society of North America (EASNA) , and pursuant to the Illinois Mental Health and Developmental Disabilities Confidentiality Act, Ill.Rev.Stat. ch. 91½, pars. 302 and 810 (a) , and the Clinical Social Work and Social Work Licensing Act of Illinois, Ill.Rev.Stat. ch. 111, par. 6366, to present this Motion to this Court and urge that the Court reconsider the matter in light of additional information and arguments which heretofore have not been presented herein.

6. BEYER respectfully asserts that communications made to her in the course of psychotherapy with MARY LU REDMOND are confidential and should be protected by a privilege in this action.

In support of this Motion, BEYER states as follows:

I.

Rule 501 intends that a federal common law be developed by the courts addressing the matter of privilege on a case-by-case basis in light of reason and experience.

The question of whether a privilege is to be recognized in a case is "governed by the principles of the common law as they may have been interpreted by the courts of the United States in the light of reason and experience." Fed.R.Evid. 501. *Memorial Hospital for McHenry County v. Shadur,* 1981, 664 F.2d 1058, 1061. Federal Rule 501 envisions the flexible development of the federal common law of privilege on a case-by-case basis. *United States v. Gillock,* 445 U.S. 360, 367, 100 S.Ct. 1185, 1190, 63 L.Ed.2d 454 (1980). In developing the federal common law of privilege, a district court must appraise both the federal and state interests in the matter, balancing the federal interest involved against the rationale and comparative strength underlying the particular evidentiary privilege claimed. *In re Production of Records to Grand Jury,* 618 F.Supp. 440 (D.C.Mass. 1985); *Ott v. St. Luke Hospital of Campbell County, Inc.,* 522 F.Supp. 706, 707 (E.D.Ky. 1981).

Resort to state law analogies is proper for the development of a federal common law of privileges in instances in which the federal rule is unsettled. *Thompson v. General Nutrition*, 671 F.2d 100, 104 (4th Cir. 1982), citing e.g., *Riley v. City of Chester*, 612 F.2d 798 (3d Cir.1979).

Privilege in federal law for communications to social workers is not settled. The United States District Court for Massachusetts has recognized it in *In re Production of Records to the Grand Jury*, 618 F.Supp. 440 (1985), stating:

> [T]his court recognizes, as a matter of federal evidentiary law, a qualified privilege for those records :11, which concern communications made to a social worker in his or her professional capacity ... insofar as the communication relates to the care and treatment of a patient. 618 F. Supp. at 441.

See also *Lora v. Board of Education*, 74 F.R.D. 565, 575 (E.D.N.Y.1977), recognizing a limited privilege outweighed by other considerations before the court.

The Northern District of Indiana has declined to recognize a privilege for communications to a social worker in *Cunningham v. Southlake Center for Mental Health, Inc.*, 125 F.R.D. 474 (N.D.Ind.1989), but that case is distinguishable from ours. Indiana privilege law reads very differently from that of Illinois, strictly limiting privilege to persons holding doctoral degrees in psychology, and a social worker would not be allowed to claim a privilege under Indiana law. In *Cunningham*, "Dopson [the social worker] has a masters degree in social work and his title is Crisis Intervention Specialist." The court held, "The psychotherapist- patient privilege should not be extended beyond the parameters of proposed Rule 504 to *social workers such as Dopson.*" (emphasis added) Dopson was required to testify as to certain statements. The patient's records, however, were protected by another state statute, and without her consent to disclose them, the court refused to order their disclosure. *Cunningham*, 125 F.R.D. 474, 478. It would appear from the language and reasoning in Cunningham that, had Indiana law recognized a privilege as to the patient's communications to Dopson, the Court would have recognized it.

In the instant cause, however, Illinois law mandates a privilege protecting records and information conveyed to a clinical social worker in the course of providing mental health services, including psychotherapy. (See detailed analysis in Section VII below.) Karen Beyer is a clinical social worker who provided mental health services to Mary Lu Redmond. Mary Lu's records and communications to Karen Beyer are privileged under Illinois law, and in this case "the psychotherapist-patient privilege should be extended beyond the parameters of Rule 504 to social workers such as" Beyer.

II.

Rule 501 envisions the flexible development of the federal common law of privilege. Mental health treatment has changed, and the profession of clinical social work has developed considerably since Rule 504 was proposed. Clinical social workers are recognized as psychotherapists in Illinois and many other states. Flexible development of the law requires evolution of the concepts of Rule 504 to reflect that development.

Proposed Rule 504 was developed in 1972. At that time, the social work profession was in its early adolescence. The practice of social work was largely generic — all social workers were trained to perform all social work functions: essentially casework, group work, community organization, and administration. At that time, most mental health care was rendered by psychiatrists and a few psychologists. Both did psychotherapy. Although many social workers were trained as caseworkers, utilizing broad psychoanalytic principles, only a few at that time were trained as psychotherapists.

Since 1972, mental health care delivery has changed dramatically. In the past two decades, as a result of research and advances into the organic causes, diagnosis and biological treatment of some mental illness, and the development of psychotropic medication, many psychiatrists have ceased functioning as psychotherapists altogether and confine their activities to the medical and pharmaceutical aspects of mental health care. (The exception is psychoanalysts, who generally eschew the biological treatments.)

Typically, even during psychiatric hospitalizations the psychiatrist manages the patient's medication, laboratory tests, etc., and to the extent that psychotherapy takes place, it is done by psychologists and clinical social workers.

In 1972, clinical social work was in its infancy and not recognized as a separate specialty within the profession, and psychotherapy was not considered a function of social work. At that time, social workers were certified in Illinois, not licensed. The qualifications for certification were a degree from an accredited graduate school of social work, an application, citizenship or declaration of intent to become a citizen, being age 21 or greater and of temperate and moral habits, and passing an examination. Ill.Rev.Stat. ch. 111, pars. 6306-07, repealed 1988. "Social worker" was defined as:

> part-time basis, to render social services to individuals, groups or communities in any one or more of the fields of social casework, social group work, community organization for social welfare, social work research, social work administration or social work education.

Ill.Rev.Stat. ch. 111, par. 6302(d), repealed, 1988.

Since that time, however, the role of clinical social workers has developed as their training and functioning have expanded. As early as 1979, with the passage of the Illinois Mental Health and Developmental Disabilities Code, Ill.Rev.Stat. ch. 91½, par. 1-100 et seq., the Illinois legislature, in its definition of "qualified examiners," began to recognize specialization and levels of competence among social workers, and the fact that some — not all — social workers are qualified mental health care providers. Pursuant to Ill.Rev. Stat. ch. 91½, par. 2-602, qualified examiners, along with physicians and psychologists, are credentialed to examine persons alleged to be subject to involuntary admission, determine if they suffer from mental illness and meet at least one other criterion for commitment, and if so, certify them for commitment. The present wording of 2-602, is:

> §1-122. Qualified examiner. "Qualified examiner means a person who is (a) a Clinical social worker as defined in this Act ... A social worker who is a qualified examiner

> shall be a licensed clinical social worker under the Clinical Social Work and Social Work Practice Act.

Ill.Rev.Stat. ch. 91½, par. 1-122. (Prior to the licensure of clinical social workers, the language of this section defined as a qualified examiner a social worker with a master's degree and three years of post-masters experience in the treatment of mental illness.)

In 1985, the Illinois appellate court examined the role of the clinical social worker as psychotherapist in the case of *Horak v. Biris*, 130 Ill.App.3d 140, 474 N.E.2d 13 (1985), and found that an action for social work malpractice exists when the social worker is functioning as a psychotherapist.

> * * * We note that the field of practice engaged in by defendant here more closely resembles the practice of psychology rather than social work, as those two practices are currently defined in the Illinois Revised Statutes. (See. Ill.Rev.Stat. ch. 111, pars. 5304, 6302.) Because of the apparent overlapping of these two fields, we think the proofs may well reveal that defendant possessed or should have possessed a basic knowledge of fundamental psychological principles ...

In 1986, the Illinois Mental Health and Developmental Disabilities Code defined "clinical social worker."

> "Clinical social worker" means a person who (1) has a master's or doctoral degree in social work from an accredited graduate school of social work and (2) has at least 3 years of supervised postmaster's clinical social work practice which shall include the provision of mental health services for the evaluation, treatment and prevention of mental and emotional disorders.

Ill.Rev.Stat. ch. 91-1/2, par 1-122.1.

This Court noted in its oral ruling on the Motion to Quash that the training of a social worker does not equal that of the other mental health professions. With respect to clinical social workers, Karen Beyer respectfully avers that this is not the case.

Karen Beyer, in addition to her other post-graduate training, is a graduate of the two-year Family Therapy training program of the

Family Institute of Northwestern University. Her formal training at least equals that of the typical licensed clinical psychologist and exceeds that of many. She has had twelve thousand hours of experience in individual, family and marital psychotherapy, and she provides clinical supervision in psychotherapy for doctoral psychology students from six graduate psychology programs. See resume, Exhibit C appended hereto and by this reference incorporated herein.

It is to be noted that the preceptorship method of education, known as "supervision," is primary in all of the psychotherapy professions. It consists of regular (usually weekly) one-to-one sessions between an advanced trainer and the supervises. sometimes group supervision is also used. The supervises presents his or her cases in detail. Supervisor and supervises discuss the diagnosis of the patient, theoretical and practical approaches to the case, and the interpretation of the psychodynamic issues and psycho- therapeutic process. The supervisor provides teaching and direction for the case. Thus, the education and development of a clinical social worker-psychotherapist extends far beyond the two- year didactic classroom and practicum program of the master's degree. A clinical social worker who is also a certified employee assistance professional, such as Karen Beyer, has also undergone additional didactic training in substance abuse treatment to qualify her for that certification.

As to the education and training of a psychologist, a substantial part of the master's program is spent in the area of psychological testing and psychometrics. The Ph.D. program (mandated in Illinois for psychologists) places much emphasis on the research and writing of a dissertation, and not so much on clinical training. One year of post-doctorate supervised practice is required for psychology licensure.

While psychiatrists are first physicians, only a brief few weeks of medical school are spent in a psychiatric rotation, and little of that, if any, involves psychotherapy. In the four-year psychiatric residency, classes and supervision are provided in psychotherapy, but by far most of the resident's time is spent in the medical aspects of mental health treatment. When it comes right down to it, the psychotherapy training of a clinical social worker must be

said to stand on a par with that of the other mental health professions.

In 1989, Illinois enacted the Clinical Social Work and Social Work Practice Act, Ill.Rev.Stat. ch. 111, par. 6351 et seq., which differentiates between the practice of clinical social work and other social work practice. Paragraph 6353 provides in pertinent part as follows:

> §5. "Clinical social work practice" means the providing of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders in individuals, families, and groups based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress.
>
> §6. "Treatment procedures" means among other things, individual, marital, family and group psychotherapy.

Ill.Rev.stat. ch. 111, par. 6353 (5), (6).

Social work, as compared to clinical social work, is described as:

> social services to individuals, groups or communities in any one or more of the fields of social casework, social group work, community organization for social welfare, social work research, social welfare administration or social work education.

Ill.Rev.Stat. ch. 111, par. 6353 (9).

The qualifications for licensure as a clinical social worker are as follows:

> §9. Qualifications for License. A person shall be qualified to be licensed as a clinical social worker and the Department shall issue a license authorizing the independent practice of clinical social work to an applicant who:
>
> * * *
>
> 3. (a) Demonstrates to the satisfaction of the Department that subsequent to securing a master's degree in social work from an approved program the applicant has

> successfully completed at least 3,000 hours of satisfactory, supervised clinical professional experience subsequent to the degree; or
>
> (b) Demonstrates to the satisfaction of the Department that such applicant has received a doctor's degree in social work from an approved program and has completed at least 2,000 hours of satisfactory, supervised clinical professional experience subsequent to the degree;
>
> 4. Has passed the examination for the practice of clinical social work as authorized by the Department ...

In 1991, the legislature further recognized the expanded and advanced role of clinical social workers as mental health care practitioners when it amended the Illinois Insurance Code to require health insurers to reimburse insureds for mental health services provided by licensed clinical social workers. Ill.Rev.Stat. ch. 73, par. 982c.

The discussion of the District Court for New Jersey in the case of *In re Grand Jury Subpoena (Psychological Treatment Records).*, 710 F.Supp. 999 (D.N.J.1989) supports Karen Beyer's entreaty for flexibility and a new look at the issue:

> * * * [T]his court does not view Congress' decision to enact Rule 501 as it now stands as a rejection of the proposed privileges or as an intendment that the federal common law of privileges should be frozen as it existed at the time the Federal Rules of Evidence too effect. Rather, Rule 501 is a mandate to the courts to develop the federal common law of privilege as reason and experience dictates.
>
> Several Circuits faced with an assertion of a psychotherapist-patient privilege have ducked the recognition issue, holding instead that even if such a privilege was available under federal common law it was not applicable in the cases before them. [citing cases] Several district judges, including Judge Weinstein, however, have found the privilege to be part of the federal common law.

> E.g. *Lora*, 74 F.R.D. AT 574. ...; c.f. *In re Production of Records to Grand Jury*, 618 F.Supp. at 433 (recognizing a social worker-patient privilege under Rule 501) ...

Clearly, Illinois law has changed and developed since 1972 along with the changes and development of mental health care delivery. Consistent with present reality, Illinois recognizes clinical social workers as psychotherapists for privilege purposes, and, Karen Beyer respectfully urges, so should this Court.

III.

Privilege protection is for the benefit of patients, not to confer status on providers of professional services. Reason requires that privilege protection be applied equally for the benefit of all psychotherapy patients.

Lora v. Board of Education, 74 F.R.D. 565 (E.D.N.Y.1977), quotes from Report 45 of the Group for the Advancement of Psychiatry (GAP) 92 (1960):

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed privileged communication. While there may be exceptions to this general rule .... there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feeling and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

Lora, 74 F.R.D. at 575-76.

It is to be noted that when GAP wrote Report 45 in 1960, the concept of a privilege for psychotherapy communications was a novel one. Clearly, GAP was describing the psychiatric modality of psychotherapy in its report, not the other psychiatric modalities, such as medication (then little used), restraints, seclusion, electroconvulsive therapy, and at that time, psychosurgery. Psychotherapy was a little-known and mysterious entity available largely for the privileged few. GAP wrote its Report to educate the legal community toward the end of developing the law to meet the developments of mental health care delivery. The arguments made by GAP for a psychiatric privilege were and are arguments for a psychotherapy privilege, not arguments for treating the psychotherapy patients of a psychiatrist differently than those of a psychologist or social worker.

Today's psychotherapy patient is likely to have as his or her therapist a clinical social worker, but from the patient's point of view and need for privacy, it really should not matter. To be treated, the patient (no matter the discipline of the therapist) must lay bare his or her most intimate and embarrassing thoughts, dreams and fears — indeed, must be able to say *anything* to the therapist, and this cannot happen if the patient is not assured that these disclosures will not leave the therapy room. The privilege is to protect the patient and the treatment, not to set apart one professional from another.

Rule 501 requires the application of reason in recognizing a privilege. With respect, given the rationale for a psychotherapy privilege, how is it reasonable to declare that communications of a patient in the course of psychotherapy with a clinical social worker-psychotherapist should be any less protected than those of a patient who is treated by a psychiatrist-psychotherapist or a psychologist-psychotherapist?

The title or academic degree of the psychotherapist must be irrelevant. Confidentiality and privilege of mental health records and information are for the protection of the patient and to encourage persons to obtain mental health services without fear of their conditions being exposed to the community. *Laurent v. Brelje*, 74 Ill.App.3d 214, 216-217, 30 Ill.Dec. 164, 392, N.E.2d 929 (1979). The patient's need for privacy exists irrespective of

the letters after the name of his or her therapist.

IV.

The Interpretation of Rule 502 (and proposed Rule 504) to exclude privilege protection to the patients of clinical social worker-psychotherapists results in unequal protection of the laws for persons who require psychotherapy and cannot afford to hire psychologists or psychiatrists.

Wealthy persons have the luxury of choosing any therapist they wish, regardless of discipline. Most people — including those who depend upon third-party reimbursement from health insurance, those who are members of HMOs or PPOs, employees who are dependent in part on Employee Assistance Programs, and those who are dependent upon community mental health centers for treatment — must take the therapist assigned to them. Psychotherapy treatment may be provided by psychiatrists, psychologists or clinical social workers. These days, most psychotherapy is done by clinical social workers, who provide some 65% of mental health care. The patient's need for psychotherapy, and his or her disclosures in psychotherapy, will be identical irrespective of the discipline of the therapist. To declare a privilege for the people who can afford psychiatrists or psychologists, and refuse one for those who must obtain treatment from a clinical social worker, would deprive the poor or less-wealthy of a legal protection available to those who could afford to pay for it. This surely cannot be the intent of this court and should not be allowed to happen as a latent consequence of an inflexible approach to the issue.

V.

The real issue in extending a privilege is not the title or training of a party to a protected relationship, but the protection of privacy of the patient and the interests of the community which give rise to a claim of privilege.

It is a principle fundamental to the fair administration of justice that the law has the right to everyone's evidence. No less fundamental to the well-being of the community is the recognition that there must be exceptions to this rule under certain circumstances. Testimonial privileges exist when the need for information conflicts with other public interests, including the community's interest in preserving certain relationships of value it in which trust is an essential element. Privileges are permitted where the exclusion of "relevant evidence" 'has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel v. United States,* 445 U.S. at 50, 100 S.Ct. at 912 (quoting *Elkins v. United States,* 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting)). *In re Doe,* 711 F.2d 1187,1193 (2d Cir.1983).

In the most influential text on the subject, Professor Wigmore has set forth four conditions necessary to the establishment of a privilege against the disclosure of communications:

> (1) The communication must be one made in the belief that it will not be disclosed.
>
> (2) Confidentiality must be essential to the maintenance of the relationship between the parties.
>
> (3) The relationship should be one that society considers worthy of being fostered.
>
> (4) The injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation.

8 J. Wigmore, Evidence § 2285, at 527 (McNaughton rev. 1961). See also, *In re Doe,* 711 F.2d 1187 (2d Cir.1983).

The interests promoted by a psychotherapist-patient relationship are extensive, including the promotion of understanding and exercise of many fundamental freedoms (e.g. those protected by the First Amendment), the ability of citizens to engage in rational thought and form belief and value systems, and the prevention of danger to the community from some mentally ill persons. *In re Zuniga,* 714 F.2d 632, 72 A.L.R.Fed. 380 (6th Cir.1983). *Zuniga* involved psychiatrists and a grand jury subpoena, but the basis upon which the court recognized a privilege was not specific to

psychiatrists -- it applies to the function of psychotherapy, irrespective of the profession of the therapist.

Without doubt, the psychotherapist-patient relationship meets the last three of Professor Wigmore's criteria. When, as in Illinois, a strong psychotherapist-patient privilege exists in state law, and representations have been made to the patient to that effect, the first criterion is also met. Further and specifically in this case, Mary Lu Redmond, as an employee of the Village of Hoffman Estates who received services from the Employee Wellness Program, had an expectation of confidentiality and privacy based upon the employee policies of the Village and the representations made to employees to induce them to seek treatment from the Program. See Exhibit A appended hereto and by this reference incorporated herein.

VI.

The patient of a psychotherapist who is a clinical social worker has no less right to or need of privacy than the patient of a psychiatrist or psychologist.

Lora thoroughly discusses the constitutional and social policy aspects of privacy in the context of mental health care. Among the points elaborated are:

> *** the interest in independence in making those choices that may seriously affect personal physical or mental health specifically, the right to be free to seek benefit from psychotherapeutic counseling. Cf. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed. 201 91973); *Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) .
>
> A forceful argument has been made that constitutionally protected privacy must, at a minimum, include the freedom of the individual to choose the circumstances, if any, under which some of his attitudes, beliefs and opinions are to be divulged. Ruebhausen and Brim, for example, usefully delineate this aspect of personal freedom as follows:

> [A]nother ... facet of the claim to privacy ... is the right to share and to communicate. Each ... of us is well aware of this complicated, ambivalent personal need to communicate and the correlative need, even while communicating, to hold back some area, at least for the moment, of ourselves. Our personal experience is supported by the behavioral scientists. They have documented our need both to share and to withhold.
>
> Psychologically, then, privacy is a two-way street consisting not only of what we need to exclude from or admit into our own thoughts or behavior but also of what we need to communicate to, or keep from, others. Both of these conflicting needs, in mutually supportive interaction, are essential to the well-being of individuals and institutions, and any definition of privacy, or private personality, must reflect this plastic duality: sharing and concealment.
>
> It follows that the right of privacy does not deal with some fixed area of personal life that has been immutably ordained by either law, or divinity, or science, or culture, to be off-limits and private. The essence of privacy is no more, and certainly no less, that the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others. The right to privacy is, therefore, a positive claim to a status of personal dignity, a claim for freedom, if you will, but freedom of a very special kind.

Ruebhausen and Brim, *Privacy and Behavioral Research,* 65 Colum.L.Rev. 1184, 1188-89 (1965) (footnote omitted) ; see also Fried, Privacy, 77 Yale L.J. 475 (1967); Parker, *A Definition of Privacy,* 27 Rutgers L.Rev. 275 (1974).

> Such a claim is particularly compelling when the material to be disclosed includes communications by a patient to a psychotherapist. Essential to psychotherapy are confidential personal revelations about matters which the patient is normally reluctant to discuss. Frequently, a patient in analysis will make statements to his psychiatrist which he would not even make to the closest members of his family. Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 Wayne L.Rev. 174, 184-85 (1960). Revelations often concern the most intimate and embarrassing details of a patient's life, and their public disclosure may well strip him of much of his own sense of human dignity.
>
> In addition to the value of affording protection to patients' subjective interest in freedom from humiliation, there is a further distinct, but causally related goal of encouraging the psychologically handicapped to seek and fully cooperate in psychotherapeutic counseling.

Lora v. Board of Education, 74 F.R.D. 565, 570-571.

In an early and renowned decision recognizing a privilege for psychotherapeutic communications, the Court of Appeals for the District of Columbia stated:

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. *** It would be too much to expect them to do so if they knew that all they say and all that the psychiatrist learns from what they say may be revealed to the whole world from a witness stand.

Taylor v. United States, 95 U.S.App.D.C. 373, 222 F.2d 398, 401 (1955) .

It must be seen that "psychiatric patient," as the Court used the term in 1955, was a generic term for "mental health care recipient." Psychotherapy patients of clinical social workers make, and must make, exactly the same types of revelations to receive exactly the same type of treatment as described in *Taylor*. Their treatment and privacy needs are exactly the same as those of any other psychotherapy patient, and in reason, the law must take the needs of all psychotherapy patients equally seriously and afford them the same protections.

VII.

By reason of well-publicized Illinois law and principles of practice of Employee Assistance Programs, Mary Lu Redmond had an expectation of confidentiality and privacy which should not be disappointed by an inflexible approach to federal procedure. Karen Beyer also had such an expectation and conducted her practice accordingly. The public policy of the State of Illinois should not be ignored or undermined.

Federal Rule 501 does not impose upon the Court a requirement that it follow state privilege law. This does not mean, however, that federal courts should not consider the law of the state in which the case arises in determining whether a privilege should be recognized as a matter of federal law. "A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy." *United States v. King,* 73 F.R.D. 103, 105 (E.D.N.Y.1976). And where a "state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule." *Lora v. Board of Education,* 74 F.R.D. 565 (E.D.N.Y.1977).

"(A state's] view of the matter and the expectations of its professionals and its patients may not be ignored. See, e.g. *United States v. King,* 73 F.R.D. 103, 105 (E.D.N.Y.1976) ; *Apicella v. McNeil Laboratories, Inc.,* 66 F.R.D. 78 (E.D.N.Y. 1975)." *Lora v. Board of Education,* 74 F.R.D. 565, 568 (E.D.N.Y.1977)

Illinois has a strong policy in favor of confidentiality and privilege of mental health records and information. "Where a person makes statements to a therapist in a professional consultation, those statements are privileged." *In re Marriage of Semmler,* 90 Ill.App.3d 649, 413 N.E.2d 502 (1980). The Illinois Mental Health and Developmental Disabilities Act defines "therapist" as:

> * * * a psychiatrist, physician, psychologist, social worker or nurse providing mental health ... services or any other person not prohibited by law from holding himself out as a therapist if the recipient reasonably believes that such person is permitted to do so. Therapist includes any successor of the therapist.

Ill.Rev.Stat. ch. 91½, par. 802 (9).

"Treatment" means an effort to accomplish an improvement in the mental condition or related behavior of a patient. Treatment includes, but is not limited to ... psychotherapy Ill.Rev. Stat. ch. 91½, par. 1-128.

The services provided to Mary Lu Redmond were clearly mental health services. By Illinois law and standards, Karen Beyer is a psychotherapist. Mary Lu Redmond received psychotherapeutic services. Both therapist and patient had an expectation of privacy and confidentiality, and it was on that basis that the services were given and received. It is the public policy of Illinois to encourage and induce people to seek mental health treatment and to protect their privacy rights in connection therewith. *Laurent,* 74 Ill.App.3d at 217, 30 Ill. Dec. 164, 392 N.E.2d 929. The views of the State of Illinois and the reasonable expectations of Karen Beyer and Mary Lu Redmond by reason thereof should not be ignored by this Court.

VIII.

There is a strong community interest in the right sought to be protected.

In general, the community has an ever-growing interest in maintaining the mental health and high functioning of its citizenry. There is widespread concern over joblessness and homelessness, impairment of productivity of workers, and the unbearable social and economic costs of mental and emotional disturbance or lack of well-being. It is in the best interests of the community that free access be had to psychotherapeutic treatment. Barriers to seeking mental health care must be removed. While psychotherapy and other mental health treatment is increasingly accepted, there still remains a stigma attached to mental illness, and fear of rejection in the community and the workplace if knowledge of mental treatment is made known. For this reason, Illinois and many other states have enacted strong confidentiality and privilege laws.

If the public is aware that disclosures to mental health professionals will remain private and confidential, there is a stronger likelihood that those who require treatment will seek it to enhance their functioning and well-being and relieve their psychic pain. This has a salutary effect on the community at large, which benefits from the increased productivity and contribution of mentally healthy and vigorous citizens. Conversely, if the public believes that psychotherapeutic revelations will be available to the minions of the legal system, much less to the community at large, this must have a chilling effect on their willingness to enter into care. The community cannot afford the consequences.

It must be noted that, in this regard, protective orders cannot help much. A patient makes revelations to a therapist in the context of complete trust and confidentiality. The fact that only a few other persons may be given access to them is not a great comfort; the patient's privacy is still invaded; she is still stripped bare in front of others; she is still humiliated. Further, with the best of intentions and care on the part of a judge issuing the tightest possible protective order, the public is aware of too many instances of leaks and improper disclosures to feel confident with anything less than total protection. No matter the punishment meted out to a miscreant "leaker," the damage to the patient cannot be undone.

IX.

Police officers involved in deadly force incidents often experience grave and debilitating post-traumatic stress symptoms. There is a strong community interest in encouraging police officers to willingly participate in psychotherapy after a critical incident.

The public is justifiably concerned with the civil rights of persons who have adversary encounters with law enforcement personnel. Public outrage is justified when excessive force is used against individuals whom police are responsible to protect, and firm remedies against infringement upon individual rights are necessary for the protection of our constitutional guarantees. What is often lost in the process is the need to protect those who are hired to protect all of us. Over the past thirty years, law enforcement officers have been required to respond to increasing violence changing their role from "peace officer" to combat level in, e.g., the war on drugs.

> A major hazard involved in being a police officer is the possibility of being involved in traumatic or critical incidents, incidents in which human lives are lost and/or serious injuries are witnessed. involvement in such episodes in highly stressful. (Stratton, 1984). it is not simply that stress symptoms occur but that they may appear with a long time delay. Specific symptoms may include guilt, anxiety, depression, sleep disturbances, flashbacks, and excessive anger. (Blak, 1986; Nielson, 1986; Reiser & Geiger, 1984; Stratton, 1984).
>
> The effects of these stress symptoms can be devastating, both at a personal and a professional level. (Blak, 1986). Therefore, there is considerable interest (Mitchell, 1986b) in finding ways to prevent, or at the very least, alleviate the symptoms. ...

J.T.Reese, J.M.Horn, C. Dunning, eds., *Critical Incidents in Policing*, Washington, D.C., 1990, p. 51.

> Ten years ago, it was estimated that 95% of police officers involved in a shooting would leave police work within five years. (Ayoob, 1981). By 1984, large departments had cut that rate to two or three percent, while small departments were losing two and one half officers for every one involved in a shooting. (McMains, 1986). A major difference between the two outcomes seemed to be the degree to which larger departments formalized

> their department's support for officers involved in traumas. Departments with clearly defined policies and procedures gave their officers a clear message that the officer was important and that the department was going to manage incidents in a way that minimized the effects of trauma. Consequently, it was not only the providing of mental health support that fosters a successful resolution of traumatic stress, it is the support of management as well.

M.J. McMains, "The Management and Treatment of Post Shooting Trauma," Id., pp 279-286.

In very recent years, police departments have begun to develop programs to assist police officers in handling the stress that accompanies their jobs. Over the past decade, some departments, such as the Village of Hoffman Estates, have instituted employee assistance programs to provide mental health services to officers with personal problems. The major barrier to the success of such programs is lack of trust. "Image armor" — denial of problems and symptoms is common among police personnel, who have an image of strength and power to live up to — is also a barrier to seeking mental health services. Law enforcement officers typically resist such aid. A basic key to the success of a police counseling program is establishing the atmosphere of confidentiality and training all personnel to respect the integrity of the service. J. A. Dunne, "Police Counseling Unit to Deal with Critical Incidents," Id. , p. 109. Unless police officers can rely on confidentiality in mental health care delivery, they will not participate in it. This would be a sad loss to the community.

M. Silva, in "The Delivery of Mental Health Services to Law Enforcement Officers," Id., p. 467, expressed it thus:

> Confidentiality. Police officers as any other counselee fear heaving their trust betrayed. Self-disclosure is frequently intimidating to counselees because of the feat of what they may discover about themselves. More intimidating still is the fear that once shared with the counselor, the latter may hold the information against him/her or maybe worse, divulge it. "Do you know anyone in police administration." "Will this information get back to them?"

> "How much of this do you have to report to the insurance company?"

If confidentiality is the *sine gua non* of psychotherapy generally, how much more essential is it in the psychotherapy provided to police officers by their own departments? A mentally healthy, stable police force is a prime asset of a community. Access by police personnel to therapy services is essential. Where, as here, the department has set in place the instrumentality to encourage this access, and has induced officers to avail themselves of therapy by assurances of confidentiality, the community has a great interest in protecting that which was promised. It is well accepted in the Employee Assistance field that without confidentiality, programs will surely fail.

Understanding the need for confidentiality if its Employee Wellness Program was to succeed, the Village adopted a policy of strict confidentiality and promulgated it among its employees. See Exhibit A. If this Court refuses to recognize the need and value of that confidentiality and will not protect it with a privilege, the damage to the Hoffman Estates program will be incalculable — but so will the damage to all police counseling and psychotherapy programs as word spreads among police officers across the country. This is too great a price for the community to pay.

IX.

There has been no showing in this case that the records and information sought from the psychotherapist are relevant or will lead to relevant information, or are probative, or necessary, or that the information cannot be obtained from other non-privileged sources. A weighing of interests requires recognition of the privilege.

In deciding whether a privilege asserted should be recognized, the Seventh Circuit has declared that the particular factual circumstances of the case in which the issue arises must be taken into account.

> The court should "weigh the need for truth against the importance of the relationship or policy sought to be

> furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case." *Ryan v. Commissioner of Internal Revenue,* 568 F.2d 531,542-3 (7th Cir.1977), cert.denied, 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978).

Memorial Hospital for McHenry County v. Shadur, 1981, 664 F.2d 1058, 1061.

In this case, public and private interests must be weighed, including those of:

> the federal government in protecting the civil rights of its citizens and redressing their grievances;
>
> the State of Illinois in encouraging mental health treatment and the wellness of its citizenry;
>
> the Village of Hoffman Estates in requiring and encouraging its employees (and particularly its public saf ety employees) to participate in therapy and its wellness program;
>
> government, industry, union and individual employee interests in the viability of the Employee Assistance Programs which are a valuable asset to the country;
>
> the interests of the plaintiff in seeking damages for a perceived wrong;
>
> the privacy and confidentiality interests of Mary Lu Redmond.

The Federal Rules of Evidence were designed to "secure fairness in administration" and permit the development of all relevant facts before the trier "to the ends that the truth may be ascertained and proceedings Justly determined." Rule 102. (emphasis added) "Just determination" involves the recognition of such privileges as are required under the circumstances of a case to balance the public and private interests involved.

A four-prong analysis has been suggested for balancing the various state and federal interests to determine whether, and to what extent, the federal common law of privilege would recognize

a state evidentiary privilege against disclosure:

> whether state courts recognize the privilege
>
> whether the state's asserted privilege is intrinsically meritorious
>
> whether the privilege should be sedulously fostered
>
> whether the injury that would inure to the relationship by the disclosure of the communication is greater than the benefit thereby gained

In re Hampers, 651 F. 2d 19, 22-23 (1st Cir. 1981); *Sabree v. United Broth. of Carpenters & Joiners of America, Local No. 33,* 126 F.R.D. 422, 425-426 (D.Mass.1989).

The fundamental factor in discoverability and admissibility must be relevance.

> "Relevant evidence" means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action "more probable ... than it would be without the evidence." Rule 401.

The issue in this case is whether the police officer used excessive force and thereby infringed the constitutional rights of the decedent. "The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor et al.,* 490 U.S. 386, 109 S.Ct. 1865 (1989). What is relevant is what happened at the scene of the shooting. There are witnesses to testify to that. There is a trier of fact to determine the weight and credibility of that evidence. Mental health records are not necessary to establish what happened. See *Jennings v. D.H.L. Airline,* 101 F.R.D. 549, 551 (N.D.Ill. 1984).

Access to Mary Lu Redmond's psychotherapist or her records is just not necessary to establish any fact relevant to this case. on the other hand, such access would invade her privacy and intrude on the confidentiality of her therapy relationship — all contrary to what had been represented and promised to her by the State of Illinois and the Village of Hoffman Estates when she entered into therapy. Such access would send a message to the citizens of the State of Illinois that they cannot rely upon the protections afforded them by their legislature and courts who have encouraged them to participate in mental health treatment by assuring them of privacy, confidentiality and privilege except under certain clearly defined exceptions, none of which apply in this case. It would discourage participation in treatment which is highly valued by the community.

It would erode the credibility of the Village of Hoffman Estates as an employer and undermine its laudable efforts to maintain a mentally healthy, high-functioning workforce -- particularly important to the community where its public safety officers are involved. Not only would the Employee Wellness Program of the Village of Hoffman Estates be adversely affected, but also Employee Assistance and Wellness programs and industrial and community mental health programs all over the country.

In *In re Production of Records to Grand Jury*, 618 F.Supp.440, the District Court for Massachusetts stated:

> *** (T)his court asks whether the state social worker-patient privilege is "intrinsically meritorious." The court so rules. The very confessional required for a patient's cure should not be lightly used to cause him harm. Between a social worker and a patient, the avenues of painful and even embarrassing disclosures must not be obstructed by fear and mistrust. With reason and from experience, this court respects both the legislative policy evident in Mass.Gen.Laws. 66A, 112, § 135, and 119, § 135, and the judicial process made manifest in the decisions of the courts of the Commonwealth. ... [T]his court can see no reason to second-guess the Massachusetts legislative determination that the patient-social worker relationship should be "sedulously fostered." At this point the (petitioner] offers little to substantiate the benefit to be gained by ordering the Department to disclose its [social worker's] record. only an adequate affidavit could provide such evidence. Absent this, the court concludes that the potential for injury to the social worker-patient relationship could well be greater than the benefit gained by the [petitioner].

618 F.Supp. 440, 443.

The citizens of Illinois have been led by the Illinois legislature and courts to have a justifiable expectation of confidentiality and privilege of mental health records and information. Mary Lu Redmond and the other employees of the Village of Hoffman Estates have been led by representations made to them by their public employer that their records and information of treatment received in the Employee Wellness Program would not be disclosed. These persons have reasonable, justifiable confidentiality, privacy and privilege expectations which merit consideration in the court's determination as to whether or not to recognize a privilege in this case.

CONCLUSION

This is admittedly not a simple matter, and Karen Beyer respectfully urges the Court not to discount the need and propriety of recognizing a psychotherapy privilege in this case simply on the basis of her professional discipline. She urges the Court to weigh the competing interests in light of the needs of psychotherapy patients, the value of psychotherapy to the community, and the value of Employee Assistance and Wellness Programs to employees, the economy, and society as a whole. Karen Beyer requests that the Court reconsider its previous ruling and recognize a privilege in this case.

Respectfully submitted,

KAREN BEYER, LCSW, CEAP

by */s/ Johathan Nye*
one of her attorneys

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFFS' MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, plaintiffs, by counsel, move the Court to compel witness Karen Beyer to answer: (1) questions within the scope of the Court's ruling of June 23, 1992 and (2) questions which relate to the memory of Officer Redmond and her ability to recall accurately the incident of June 27, 1992, when she shot and killed plaintiffs' decedent, Ricky Allen. Plaintiffs also request the Court to compel the production of notes and documents prepared and maintained by Beyer concerning conversations that Beyer had with Redmond.

Grounds for these requests are as follows:

1. On June 23, 1992, the Court ruled that Karen Beyer, a social worker employed by the Village of Hoffman Estates, could be deposed "only with respect to the disclosures made to her by Ms. Redmond of the incident of the day that relate to the matter that is at issue in this lawsuit." (Tr., 6/29/92, 11, attached.)

2. Beyer's attorney has construed the Court's order in an artificial and unreasonable manner and precluded any inquiry into matters concerning Beyer's recollection, bias and credibility. Beyer was instructed not to reveal whether she had reviewed documents before coming to the deposition (Beyer Dep. 18); whether she made any notes summarizing what Redmond had said about the incident (Beyer Dep. 24-25, 58); to whom she had spoken, besides her attorney, about the deposition (Beyer Dep. 28); whether she had been paid by Redmond for administering therapy (Beyer Dep. 34); whether she knew what Redmond had said when deposed (Beyer Dep. 37); and how many-times she had seen Redmond (Beyer Dep. 49).

3. Beyer also refused to produce her records which show when and how often she met with Redmond, as well as her records that set out statements made by Redmond about the shooting incident. (Beyer Dep. 17-18.)

4. Beyer should be instructed to answer the questions referred to in paragraph 2 above and to produce the records described in paragraph 3. Appropriate sanctions should be imposed for the unreasonable position taken by Beyer's attorney in construing the Court's ruling.

5. In addition to being ordered to answer the recollection, bias, and credibility questions referred to above, Beyer should be ordered to answer questions that are relevant to Redmond's ability to recall her actions on the day she shot and killed Ricky Allen. As explained in the attached letter from Dr. Robert Shelton, additional information, that is known to Beyer, would be relevant to whether Redmond is presently accurately recalling the incident. As Dr. Shelton explained, "[a] review of therapy notes, candid responses from [Redmond's] therapist, or statements based on trauma memory . . . could answer these questions [about the nature or type of Officer Redmond's memory]."

Respectfully submitted,

/s/ Kenneth N. Flaxman
an attorney for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFFS' MOTION FOR SANCTIONS

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, plaintiffs, by counsel, move the Court to impose appropriate sanctions on defendant MaryLu Redmond for her evasive and incomplete answers to questions concerning her conversations with Karen Beyer.

Grounds for this motion are as follows:

1. In prior proceedings, the Court directed defendant Redmond to answer questions concerning her conversations with Karen Beyer that touched on the shooting of Ricky Allen. The Court also ordered Beyer to produce her notes that summarized statements that Redmond made about the incident.

2. At her deposition (a sealed copy of which is tendered with this motion), Redmond claimed that she could not recall:

   a. whether she ever told Beyer that she had shot someone to death (Dep. 365);

   b. whether she had told Beyer that she had drawn her gun (Dep. 366);

   c. whether she ever discussed with Beyer her belief that she was justified in shooting Ricky Allen (Dep. 386);

   d. whether she ever told Beyer why she felt she had to shoot Ricky Allen. (Dep. 419)

3. The documents recently produced by Beyer (tendered under seal with this motion) show that in their first meeting, Redmond shared with Beyer her opinion that the shooting was justified. (Diagnostic Profile, July 9, 1991.) The documents also show that Redmond discussed with Beyer her inability to recall pulling the trigger (Progress Notes, November 13, 1991), and that Redmond explained to Beyer the placement of people at the shooting scene. (Progress Notes, December 2, 1991.)

4. Rule 37(a)(3) states in part that "an evasive or incomplete answer is to be treated as a failure to answer." This rule is consistent with Judge Learned Hand's observation in United States v. Appel, 211 F.Supp. 495, 496 (D.N.Y. 1913):

> A court, like anyone else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week.

5. "[T]estimony false and evasive on its face is the equivalent of refusing to testify at all." *Richardson v. United States,* 273 F.2d 144, 147 (8th Cir. 1959). As in *Martin-Trigona v. Gouletas,* 634 F.2d 354 (7th Cir. 1980), Redmond's claimed inability to recall "was an attempt to avoid answering the questions." Id. at 357.

6. Sanctions are required when, after being ordered to answer questions, a party refuses to comply with that order by feigning an inability to recall. Plaintiff suggests that the appropriate sanction is to bar Redmond from testifying at trial that she recalls drawing her firearm and shooting Ricky Allen to death.

Respectfully submitted,

/s/ Kenneth N. Flaxman
an attorney for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SANCTIONS

NOW COME the Defendants, VILLAGE OF HOFFMAN ESTATES and MARYLU REDMOND, by their attorneys, Segal, McCambridge, Singer & Mahoney, Ltd. and respond to Plaintiffs' Motion for Sanctions as follows:

I. Plaintiffs Have Not Cited Any Case Law Which Supports Their Requested Relief in a civil case.

In their motion, plaintiffs seek to bar the testimony of MARYLU REDMOND based on what they conclude are evasive answers to questions asked at her deposition. Both cases relied upon by the Plaintiffs, *Richardson v. United States*, 273 F.2d 144 (8th Cir. 1959) and *United States v. Appel*, 211 F.Supp. 495 (D.N.Y. 1913) establish a test for false and obstructive testimony in criminal contempt cases, but not civil cases, such as we are faced with. Such a test is followed when courts "consider the power to punish for criminal contempt as an inroad upon the procedural safeguards of the Bill of Rights." *Collins v. United States*, 269 F.2d 745-50 (9th Cir. 1959). Plaintiffs have not supplied this Court with any case law which grants the type of relief they request in a civil case.

Plaintiffs also rely on *Martin-Trigona v. Gouletas*, 634 F.2d 354 (7th Cir. 1980), where an individual was confined to a correctional center until he answered certain questions concerning his own assets. There, the witness attempted to avoid answering such questions, and invoke the privilege of self-incrimination as to an underlying lawsuit. Id. at 356. The court gave the witness an opportunity to explain how such answers would incriminate himself, found that no such situation existed, and ordered him to answer certain questions. In response to those questions, the witness claimed lack of knowledge, which the court found to be in bad faith, thus holding him in contempt. Id. at 356. This is an entirely different situation from MARYLU REDMOND. Ms. Redmond never refused to answer any questions regarding the facts of the shooting of Ricky Allen. In fact, Ms. Redmond gave a rather detailed account of the events of June 27, 1991, including:

(1) That she shot someone to death. (Redmond Dep. pg. 39.)

(2) That she drew her gun at Ricky Allen. (Redmond Dep. pg. 208.)

(3) That her actions were justified. (Redmond Dep. pg. 313-314.)

(4) That she felt she had to shoot Ricky Allen to save another person's life. (Redmond Dep. pg. 151-153.)

Ms. Redmond has never attempted to avoid answering the questions of Plaintiffs' counsel, except when directed by her own attorney. Ms. Redmond has confirmed that the facts of the shooting have not changed, and her memory of the incident has not changed. (Redmond Dep. pg. 360.) It is only when Plaintiffs' counsel began asking specific questions regarding conversations between MaryLu Redmond and her counsellor, Karen Beyer, time and time again, Ms. Redmond could not recall the substance of these conversations. (Redmond Dep. pg. 363-382.) Rather than perjure herself by speculating as to what was contained in the conversations between herself and Karen Beyer, almost one full year earlier, she answered the questions honestly and to the best of her ability. Plaintiffs have not proved anything contrary to this. Further, plaintiffs have not presented any case law or other evidence which would allow this Honorable Court to grant the relief they seek.

II. Plaintiffs' Attempt to Impeach the Recollection of MaryLu Redmond is Misplaced

As mentioned earlier, MaryLu Redmond has recited, several times, the facts of the shooting in a consistent and reliable manner; but Plaintiffs still contend, stubbornly and without basis, that Ms. Redmond is "feigning an inability to recall" the facts of the shooting incident which is the basis of their lawsuit. Plaintiffs' have attempted to side track the court as to the material issues in this case, as framed by the plaintiff's Complaint, namely: Whether a violation of Ricky Allen's civil rights occurred due to Ms. Redmond's use of deadly force; Whether Ms. Redmond's actions constituted a wrongful death of Ricky Allen; and Whether a violation of the Ricky Allen's childrens' civil rights occurred due to Ms. Redmond's use of deadly force.

Plaintiffs' are attempting to interject a purely collateral and irrelevant source of information, namely Karen Beyer. All of Ms. Redmond's visits to Ms. Beyer occurred after the shooting. If these meetings had not occurred, the issues in the case would not change. The substance of the conversations between Ms. Redmond and Karen Beyer do not, and can not affect the issues before this court. Ms. Redmond has not denied that the visits to Karen Beyer occurred, or that the facts of the shooting were discussed at these meetings.

Ms. Redmond has merely made a good faith attempt to answer the questions posed by plaintiffs' counsel, to the best of her recollection. No basis for creating a new issue in the case exists simply because plaintiffs' counsel chooses not to accept or believe the answers he received at deposition.

In Illinois, impeachment is to be used solely to attack the credibility of a witness, not as substantive proof of an issue, and the credibility of the individual remains a question of fact for the jury. *Corneiller v. School District 152,* 62 Ill. Dec. 372, 378 N.E.2d 1247 (1st Dist. 1978). Plaintiffs' attorneys are attempting to suggest to this court that their own feelings and suspicions should be construed as the decision of a jury as to the credibility of Ms. Redmond's testimony. This, of course, is not how our legal system operates with respect to the impeachment of testimony. Plaintiff's motion must therefore be denied. If credibility of a witness were to be determined by the attorney asking the questions at a deposition, there would never be the need for anyone to testify at trial; everyone would be lying.

WHEREFORE, Defendants, VILLAGE OF HOFFMAN ESTATES and MARYLU REDMOND, respectfully request that this Honorable Court enters an order denying Plaintiffs' Motion in its entirety, and further finds that no sound basis exists for the

filing of said motion, thus granting Defendants their costs, including reasonable attorneys fees, incurred in having to respond to and appear on said motion.

/s/ Robert E. Wilens
an attorney for defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFFS' SECOND MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS AND MOTION TO MODIFY ORDER OF DECEMBER 10, 1992

Plaintiffs, by counsel, move the Court to direct deponent Karen Beyer to answer questions concerning what defendant Redmond told Beyer about the nature of Redmond's pre-shooting relationship with plaintiffs' decedent Ricky Allen. In addition, because of potential perjury that was revealed at the second installment of Beyer's deposition, plaintiffs request the Court to modify its order of December 10, 1992 a) to permit an unrestricted inquiry into statements made by Redmond to Beyer and b) to require the production of all of Beyer's notes.

Grounds for these requests are as follows:

1. This case arises out of the fatal shooting of plaintiffs' decedent Ricky Allen by Hoffman Estates police officer MaryLu Redmond. Redmond's defense is that she acted reasonably when she saw Ricky Allen chasing another man with a knife.

2. Redmond has claimed that, before shooting Ricky Allen, she had not met any members of plaintiff's family (Redmond Dep. 318) and that she did not recognize Ricky Allen. (Redmond Dep. 305.) Redmond has also claimed that at the time of the shooting, she was not suffering any stress in personal relationships. (Redmond Dep. 194, 273). Each of these claims is relevant to the credibility of Redmond's reasonableness defense; each of these claims appears to be false.

3. At the second installment of her deposition, Karen Beyer stated that Redmond had told her that she had met Ricky Allen before killing him (Beyer Dep., Jan. 26, 1993, 32-33):

Question: Did Miss Redmond ever tell you that she [33] knew Ricky Allen before she killed him?

Beyer: She told me she had met him.

Q: Did she tell you how she had met him?
Beyer: Yes.

4. On the advice of counsel, Beyer refused to state how Redmond had met Ricky Allen. (Beyer Dep., Jan. 26, 1993, 38.)

5. Beyer also stated that Redmond told her that she had been having "a relationship problem" at the time she shot Ricky Allen (Beyer Dep., Jan. 26, 1993, 28):

Question: Did Miss Redmond discuss with you that she was having a relationship problem at or about the time that she shot Ricky Allen?
Beyer: Yes.

6. Again, on the advice of counsel (Beyer Dep., Jan. 26, 1993, 30), Beyer refused to provide any further details about the "relationship problem."

7. These two areas — Redmond's relationship with Ricky Allen before she shot him and her emotional state at the time of the shooting — are among those that could be relied on by an expert in offering an opinion on the reasonableness of Redmond's actions and which could be weighed by a jury in assessing the reasonableness of the shooting. These two areas involve matters that are relevant to this lawsuit and Beyer should be directed to answer follow up questions concerning these areas.

8. Beyer should also be directed to produce all of her notes for inspection. At the second installment of her deposition, Beyer explained that she would record the "major themes of the conversation" (Beyer Dep., Jan. 26, 1993, 11) after each meeting with Redmond. Beyer has produced three pages of heavily redacted notes; based on Beyer's recent revelations that Redmond had met Ricky Allen before killing him and that Redmond was having personal problems at the time of the shooting, it is likely that additional relevant information is contained in the interview notes.

9. In addition, plaintiffs should be permitted to depose Beyer without restriction as to subject matter. Based on Beyer's recent revelations, it is likely that further inquiry of Beyer will reveal additional information relevant to the reasonableness of Redmond's

actions.

It is therefore respectfully requested that the Court:

A. Direct deponent Karen Beyer to answer questions concerning what defendant Redmond told Beyer about the nature of Redmond's pre-shooting relationship with plaintiffs' decedent Ricky Allen;

B. Modify its order of December 10, 1992

   i. to permit an unrestricted inquiry into statements made by Redmond to Beyer and

   ii. to require the production of all of Beyer's notes.

Respectfully submitted,

/s/ Kenneth N. Flaxman
an attorney for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

EXCERPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
February 5. 1993

* * *

[2]

THE COURT: That's a question that — I read the earlier pages as well — and that is a question that was not permitted to be answered in the course of the deposition.

Mr. Rogus, we have a difference of perception about the appropriate areas of inquiry in a situation in which, as I say, where ever in 1983 actions-the issue of motive, the issue of state of mind, is obviously a critical factor. And where — you know the nature of the matter is that we do not perform trepanning operation — you don't saw off the top of someone's head and try to peer inside — all we can do is to deal with the objective facts as best we can ascertain them. And it seems to me that Mr. Flaxman has made a sufficient showing here to entitle him to the relief that he seeks.

I am going to continue to maintain that's to be on a strict "counsels' eyes only basis," so that nothing is going to go either — even for Mr. Flaxman to his client — but certainly [7] he is entitled as part legitimate discovery to engage in this.

MR. ROGUS: Your Honor, he's for I believe documentary production as well as additional testimony —

THE COURT: Right.

MR. ROGUS: Is the scope of your ruling going to now encompass the documentary evidence —

THE COURT: Yes.

MR. ROGUS: — that we reviously discussed?

THE COURT: The notes as well. Right.

MR. ROGUS: And for purposes of my advising Ms. Nye, are we talking about the entire set of notes

THE COURT: Yes.

MR. ROGUS: With no redactions?

THE COURT: Yes. I think that we can have sufficient confidence in Mr. Flaxman in that respect that it is not going to be the subject of permitting him to roam around in matters that are outside the scope of the review that I had expressed, you remember the first time, that we confronted this issue. But the point is that redaction is a one-sided activity, and I am not prepared to give effectively Carte Blanche in terms of how and what to redact to the author of those notes, or to anybody else.

So the answer is "Yes." And Mr. Flaxman can then resume that deposition — the depositions — based on that.

Now I suppose what I ought to do is set a next status [8] date. And I would hope that if we set it maybe four weeks out that should be enough time to have gotten through all of this, unless that's a problem. is that all right? * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

PLAINTIFFS' MOTION TO IMPOSE SANCTIONS ON DEFENDANT REDMOND

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, plaintiffs, by counsel, move the Court to impose appropriate sanctions on defendant MaryLu Redmond for causing Karen Beyer to refuse to comply with the Court's order of February 3, 1993.

Grounds for this motion are as follows:

1. In its order of February 3, 1993, the Court directed Karen Beyer to produce, for counsel's eyes only, her unredacted notes of conversations she had had with defendant Redmond. The Court also ordered Beyer to answer questions about statements made by Redmond concerning how she had met Ricky Allen before she shot him and about the "relationship problem" she was having when she shot Ricky Allen.

2. Following entry of the February 3rd order, Beyer, who is the Director of Health and Human for defendant Hoffman Estates, has come to be represented by new counsel. Beyer's new attorney has represented to counsel that Beyer will not produce any documents "absent the express authorization by MaryLu Redmond to do so." Beyer's counsel goes on to state that Beyer will provide "no documents of any kind other than the previously authorized notes/documents relating to the facts, or relating to MaryLu Redmond's statement of the facts, concerning the incident/occurrence of June 27, 1991 which is at issue in the subject litigation." (Letter from William Barasha, March 3, 1993, attached.) (emphasis supplied)

3. A fair reading of Mr. Barasha's letter is that defendant Redmond had at one time expressly authorized Beyer to release notes and documents and that Redmond has now instructed Beyer to refuse to comply with the Court's order. Such conduct should not

be tolerated and appropriate sanctions should be imposed.

Respectfully submitted,

/s/ Kenneth N. Flaxman
an attorney for plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[title omitted in printing]

MOTION TO RECONSIDER

NOW COME DEFENDANTS, MARYLU REDMOND and VILLAGE OF HOFFMAN STATES, by their attorneys, Segal, McCambridge, Singer & Mahoney, Ltd., and move this Honorable Court to reconsider and to vacate its order entered on April 6, 1993, and in support of said motion, state as follows:

1. On April 6, 1993, this Court granted Plaintiffs' Motion for Sanctions against Defendant, MARYLU REDMOND for causing Karen Beyer to refuse to comply with this Court's order of February 3, 1993.

2. Specifically, this Court held, in part, that "Defendant, REDMOND will be precluded at trial from testifying as to her version of the events in which she shot Ricky Allen, because she and Defendant HOFFMAN ESTATES have blocked the Plaintiffs from effective cross-examination on that subject." (Transcript of Proceedings on April 6, 1993, p. 5-6.) (A copy of those proceedings are attached as Exhibit A.)

3. In response to defense counsel's question seeking clarification of the basis for the Court's ruling at that hearing, the Court pointed to "a combination of two things," by stating that REDMOND gave "less-than-credible responses to the inquiries about her recollection of the information that she provided to Karen Beyer ...", as well as "her combined failure and refusal to take any action from the outset that would lead to the provision of these materials by way of discovery." (Transcript of Proceedings on April 6, 1993, p. 7.)

4. On April 8, 1993, the Court, issued a supplemental memorandum regarding its ruling of April 6. (A copy of the Memorandum is attached as Exhibit B.)

5. In the Court's Memorandum, the court identified that only Karen Beyer had "flouted this Court's order to answer questions in her deposition," and that REDMOND's violation was limited to her "non-compliance with her discovery obligations under Federal Rule of Civil Procedures 37", which the Court characterized as "conduct by REDMOND that has interacted with Beyer's actions to thwart Plaintiffs, legitimate efforts to obtain needed discovery." (Memorandum of Court, April 8, 1993, p. 2.)

5. Defendants contend that REDMOND has not violated any Court Orders, at no time instructed or even encouraged Karen Beyer to violate any Court Orders, and has not been guilty of any misconduct which merits the drastic sanction imposed by this Court. Accordingly, the Court should reconsider its order of April 6, 1993, and vacate its barring the trial testimony of REDMOND as to her version of the event in which she shot Ricky Allen. As will be discussed below, nearly eight months have now passed since this Court's ruling. Based upon information provided to defense counsel, there still has been no finding of contempt entered by any judicial officer against Karen Beyer. This Court did not specifically enter such a finding in April, but instead referred the matter to the United States Attorney' "for consideration of possible prosecution as criminal contempt." Given this Court's view of the "interaction" of the conduct of Ms. Redmond and Ms. Beyer, and the absence of any finding to date of actual criminal contempt on the part of Ms. Beyer, it is manifestly unfair, unwarranted, and unconstitutional for this Court to maintain the position that Ms. Redmond be barred from testifying at trial.

ARGUMENT

I. THE ACTIONS OF MARYLU REDMOND OR ANY OTHER INDIVIDUAL DO NOT SUPPORT THE SANCTIONS LEVIED BY THIS COURT IN ITS ORDER OF APRIL 6, 1993.

A. The Actions of Karen Beyer Should Not Be Used As A Basis For Sanctioning MARYLU REDMOND Since There Has Been No Finding Of Contempt As Against Karen Beyer.

The holding of this court in April, 1993, concentrated on two distinct, yet ultimately intertwined issues. The first, as mentioned *supra,* was the propriety of barring the testimony of MARYLU REDMOND. The second involved the referral of Karen Beyer's actions to the United States Attorney for consideration of possible prosecution as criminal contempt under Federal Rule of Criminal Procedure 42(b). As a basis for barring Ms. REDMOND's testimony, the Court has concentrated not only on Ms. REDMOND's own inability to remember, but also MS. Beyer's "willful flouting of the Court's orders and authority." (Transcript of Proceedings, April 6, 1993, p. 3.)

On December 10, 1992, this Court heard live testimony from Ms. REDMOND. A copy of those proceedings is attached as Exhibit C. At the conclusion of her testimony, the Court "did not find that what has been said by Ms. REDMOND today is entirely believable." (Transcript of Proceedings of December 10, 1992, p. 43.) However, the Court further stated that it was "reluctant" to characterize that as the "kind of wilfulness that calls for a dramatic sanction -- ultimate or nearly ultimate sanction -- of the type that's been asked for on behalf of the Plaintiff. The notion of foreclosing Ms. REDMOND's opportunity, for example, to testify in connection with this trial, is a notion that I think is inappropriate." (emphasis added) (Transcript of Proceedings, December 10, 1992, p. 43.) Given this pronouncement by the Court as of December 10, 1992, something must have occurred between December 10, 1992, and April 6, 1993, which represented the type of "willfulness that calls for a dramatic sanction" and acted to convince the Court that this previously "inappropriate" sanction was now merited. However, Defendants contend that it was no act of Ms. REDMOND which "broke the camel's back," since her involvement with the Court at that point had been completed, and the Court had already articulated the inappropriateness of a dramatic sanction, even though the Court did not entirely believe the defendant.

Instead, the only possible precipitating event or events were the decisions and/or actions of Karen Beyer. As recited in the Court's Memorandum of April 8, 1993, violating a Court Order "was the only nature of Beyer's offense, for she had flouted this Court's order to answer questions in her deposition." (See Memorandum, Exh. B, p. 2.) The Court then referred to Ms. REDMOND's non-compliance with discovery obligations under Federal Rule of Civil Procedure 37, and how that non-compliance "interacted" with Ms. Beyer's decisions. The Court must be referring to Ms. REDMOND's failure to authorize Ms. Beyer to disclose any and all records in her possession regarding their meetings. However, Defendants disagree with the insinuation that Ms. REDMOND had anything to do with Ms. Beyer's independent decisions.

At hearing in open court, Ms. REDMOND stated that at no time, had she ever told Karen Beyer that she was not to produce the documents as required by the Court. (Transcript of Proceedings, March 8, 1993, p. 5-6.) (A copy of those proceedings are attached as Exhibit D.) Further, Ms. REDMOND has never instructed another individual or entity to convey to Ms. Beyer that she should not obey the Court's Order. (Transcript of Proceedings, March 8, 1993, p. 6.) Notwithstanding, it would be wholly irrelevant even if Ms. REDMOND had done any or all of the above-mentioned acts, thus authorizing Ms. Beyer to comply with Court's Order, since Ms. Beyer testified at those same proceedings that such acts would not conclusively persuade her to comply. (Transcript of Proceedings, March 8, 1993, p. 13.) She also testified that she would not turn the records over to a HOFFMAN ESTATES official, even if ordered to do so by her employer. (Transcript of Proceedings, March 8, 1993, P. 32.) The overall effect of Ms. Beyer's testimony affirmatively shows that neither Ms. REDMOND nor HOFFMAN ESTATES had any control over the decision making process or actions of Ms. Beyer in this particular regard.

Nonetheless, from those proceedings, this Court concluded that the actions of Ms. Beyer, although insufficient for the Court to then and there find Ms. Beyer in contempt of court, were sufficient to impose a dramatic sanction upon Ms. REDMOND. It must be noted that, to date, the attorneys for Defendants have directed inquiries to the United States Attorney, and to Mr. David Americus, the attorney representing Karen Beyer in that matter, regarding the status of the criminal contempt issue, and have been informed that no contempt charges or recommendations have been filed against Karen Beyer for her actions in this matter.

Therefore, Defendants urge that the Court reconsider its ruling of April 6, 1993, vacate its previous order and allow Ms. REDMOND to testify at trial of this matter, since no formal finding of contempt has been issued, nor have formal charges been entered against Karen Beyer.

B. Without The Opportunity To Testify, Ms. REDMOND Cannot Receive A Fair Trial.

On April 6, 1993, this Court imposed a dramatic sanction upon MARYLU REDMOND, namely barring her testimony at trial as to "her version of the event in which she shot Ricky Allen." Without the ability to testify on her own behalf, regarding her own, perceptions, actions and justifications for her actions, the jury will be deprived of hearing all of the facts and unquestionably denied an opportunity to consider all the relevant evidence bearing upon the issue as to whether Ms. Redmond's actions on June 27, 1991 were objectively reasonable.

The failure to allow Ms. REDMOND to testify would also deprive her of her right to a trial by jury, a right guaranteed by the Seventh Amendment to the United States Constitution in cases involving legal rights as opposed to equitable rights. *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.*, 553 F.Supp. 118 (N.D. Ill. 1982). Should Ms. REDMOND be prevented from testifying before the jury, it cannot be said that she has had her day in Court and has received a fair trial. Although she would be in the courtroom, these will undoubtedly be confusion and considerable doubt generated by the absence of her eyewitness testimony, much to her prejudice. To avoid this possible Constitutional issue and insure a fair trial, Ms. REDMOND must be allowed to testify regarding the topics previously barred by the Court's Order of April 6, 1993.

II. A DETERMINATION OF CREDIBILITY WITH RESPECT TO MARYLU REDMOND'S TESTIMONY IS NOT TO BE MADE DURING PRE-TRIAL STAGES.

It is well-established that the credibility of a witness is a question of fact for the jury to decide. *U.S. v. Zouras*, 497 F.2d 1115 (7th Cir. 1974). Here, however, the jury will not have the opportunity to make its own credibility determination as to the testimony of MARYLU REDMOND regarding the events leading up to the shooting of Ricky Allen, since the Court has effectively taken away that basic duty and has substituted, in its stead the Court's own indelible stamp of non-credibility.

Defendants respectfully contend that the barring the defendant's testimony in advance of trial premised, at-least in part, on the Court's own assessment of credibility, was clearly improper, and urge the Court to reconsider and vacate its order of April 6, 1993.

III. CONCLUSION.

Given all of the aforementioned reasons and authorities, Defendants, MARYLU REDMOND and VILLAGE OF HOFFMAN ESTATES, respectfully request that this Honorable Court reconsider its order of April 6, 1993 and enter an Order vacating that previous Order, thus allowing MARYLU REDMOND to testify at trial regarding her account of the events of June 27, 1991.

/s/ *Gregory E. Rogus*
an attorney for defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

EXCERPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
December 10. 1993

* * *

[5]

THE COURT: Let me turn to the main aspect of this morning, and that has to do with the motion that I vacate my earlier order about Ms. Redmond. There is no reason that the two you have to be standing up. I expect to deal with this perhaps at a little length, and you may want to make notes and sit down for that purpose. At the — you can sit down.

What the defendants have asked for is that I vacate that April 6th 1993 order in which I precluded the individual [6] defendant Mary Lu Redmond from testifying about her version of the events in which she shot Ricky Allen. And I am going to come to that aspect of the thing in a moment, but first I have to say that this motion seems to reflect that counsel still doesn't get it. There hasn't been any relevant change in circumstances since that order was entered. What I see in this current motion is a continued distortion of what I said during the April 6th hearing and what I wrote in my brief April 8th memorandum.

It was totally within Ms. Redmond's control to provide plaintiffs with the ability to cross-examine her effectively about her version of the events. obtaining information from — and I am now talking about her version of the events as it was very shortly after the occurrence, as contrasted with her version of the events as of the time of the deposition — obtaining information from Ms. Beyer would have been an indirect and not an entirely satisfactory way to derive information on that same subject, but it's one to which the plaintiffs were driven by the purported total lack of recollection on Ms. Redmond's part about what she had told Ms. Beyer.

Incidentally, and very importantly I think, even if Ms. Beyer continued to flout what was a direct court order by stonewalling about what Ms. Redmond had told her, there was nothing to prevent Ms. Redmond from getting that information from Ms. Beyer and providing proper answers to plaintiffs, [7] counsel, rather than persisting in what I observed to be a wholly noncredible purported total failure of recollection.

Now what a busy prosecutorial staff in the United States Attorney's office may or may have decided to do about Karen Beyer, about any possible criminal contempt, is frankly just irrelevant. My view I know differs a bit from that of some of my colleagues. My sense is that it's not for this Court or for any other court to attempt to set priorities for a prosecutor. My own sense is that separation of powers considerations tend to make that unseemly. If the conduct in this case involves or occupies a low priority, or maybe even no priority, in relation to the activities of the United States Attorney's office, which is seriously occupied in a lot of other matters, I would think it frankly quite improper for me to express any level of insistence.

You know, I could do that. I could press. But that's not my sense of what the proper role of a judge is when a matter is referred to a prosecutor for consideration. And accordingly the fact of action or inaction by that office really does not bear upon my evaluation of Ms. Beyer based upon my listening to her and my observing her, just as it doesn't bear on my observation and my evaluation of Ms. Redmond based on her testimony as well as upon the paper record.

Now it's of course true that I expressed reluctance in December of '91 to enter that bar order that I did in April '92. [8] But it's inaccurate to say that nothing in between occurred to change that perspective. Quite the contrary. During that period of time Ms. Redmond had plenty of opportunity to rethink her stonewalling refusal, and she expressly stated during the March 8th hearing — that is part of the material that you have attached — that she would disobey a court order that she authorize Ms. Beyer to produce notes. Clearly Mr. Rogus has forgotten that in saying what he did about the idea that nothing happens, and suddenly the Court seems to change its perspective.

What we had demonstrated (and have had demonstrated) by Ms. Redmond has clearly been a scofflaw position, open defiance. And it is not critical in that sense that Ms. Beyer independently refused to obey and to comply with a court order. So this is not at all a matter of somehow visiting the sins of Karen Beyer on Mary Lu Redmond. Mary Lu Redmond has brought the consequences on herself directly.

Now having said all of that, I take this motion for reconsideration seriously. Indeed, one of the things that has led me to give a lot of hard thought to this is the matter we discussed at our voir dire conference, in terms of how to develop an appropriate statement or instruction for the jury. It is of course awkward to be dealing with matters to the jury other than in an evidentiary form in all events. And I tried to think about reshaping this, and it seems to me that reconsideration is in order as a contrast to an outright bar [9] order, and also consistently with the principle that whenever we deal with this kind of violation we ought to look at the least severe sanction.

Here is what I have conceived in this situation. There may be a better analogy available under well-established law. What has taken place here is the equivalent of the spoliation or destruction of evidence. It's just as though Ms. Beyer's notes on her conversations with Ms. Redmond were destroyed, because those things are just as unavailable to the plaintiffs as though they had been physically destroyed. And this case of course does not involve the kind of question that's frequently encountered in spoliation-of-evidence situations — that is, whether the destruction took place in the regular course of business and therefore is potentially neutral or innocent, or whether the destruction was in bad faith because of the pendency of the litigation. In this case the effective equivalent of destruction of evidence is inextricably linked to, and is in the teeth of, this lawsuit and the flouting of the rules of procedure and court orders.

Now there are lot of cases that deal with the more conventional type of spoliation to which this is analogous. And I believe that the issue may be better dealt with by permitting Ms. Redmond to testify to her version with full right of cross-examination, including the fact of her post-occurrence consultations with Ms. Beyer, when those occurred, the fact that [10] Ms. Redmond discussed with Ms. Beyer what happened during the incident, and with the jury then instructed that the evidence — well, that Ms. Redmond and the Village have refused to make available to plaintiffs — and of course that means to make available to the jury as well — evidence about what Ms. Redmond said during those conferences with Ms. Beyer. And then, in accordance with the established rule of law, that the jury is entitled to draw the adverse inference that the withheld evidence would have been unfavorable to Ms. Redmond and the Village.

Now I took a look yesterday at case law on this, and I found two Seventh Circuit cases of recent vintage — and there may be more, by the way, because they cite back to others of course — but these two particularly that expressly apply and uphold just such an inference. one of those is the well-known case of Brown & Williamson Tobacco Corporation against Jacobson, 827 F.2d 1119. At 1134, the Court says:

> "A court and a jury are entitled to presume that documents destroyed in bad faith while litigation is pending would be unfavorable for the party that has destroyed the documents."

Earlier this year Judge Posner said in a case Partington against Broyhill Furniture Industries, Inc. 999 F.2d 269 at 272 (Seventh Circuit, 1993) — by the way, one of the cases in which he talked about the problem of having to [11] determine under what circumstances the destruction took place. He said:

> "But if, being sensitive to the possibility of a suit, a company then destroys the very files that would be expected to contain the evidence most relevant to such a suit, the inference arises that it has purged incriminating evidence."

What I am are ruling here, and as really a replacement for this idea of a bar, serves I think both reasons for drawing that inference. Let me just read to you from a case from another Circuit. It's a First Circuit 1982 case, Nation-Wide Check Corporation against Forest Hills Distributors, and I found in a Ninth Circuit 1991 case being quoted. That's Akiona against the United States, 938 F.2d 158 at 161. Here is what the Nation-Wide case said:

> "The adverse inference is based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has noticed that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document . . .
>
> "The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier [12] of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial."

Again I emphasize these cases of course talk about the more frequently-encountered situation of destruction. But there isn't any question at all that to put these things into a sealed isn't any question at all that to put these things into a sea box, withhold them both from plaintiffs, counsel and from the jury, is the effective equivalent of the destruction of those documents. They do not exist, unfortunately, so far as this trial is concerned.

Now having said all of this, I have to confess one other thing to you — and that is, what I have not done is to locate a jury instruction that's tailored to this principle What I did do, having done this part of the research myself, was to ask my clerk to do some looking in that respect. But Devitt and Blackmar was not of any help. The things that I keep in chambers, which are all of the different circuits, published books on standard jury instructions, really didn't provide anything. And as you know if you've attempted to do research, jury instructions are very hard to research quickly through the use of LEXIS and Westlaw. You know, the language that tends to be used is not that readily recaptured. Accordingly I am going to leave that search to you people.

But I want both sides to understand that what I have done here is to shape something that I think is the least severe [13] sanction that can be devised that is directly appropriate to the course of conduct that's involved, and something that apprises the jury both fairly and accurately about the nature of the conduct and the fact that it can draw an inference from it.

And accordingly I am granting the motion to reconsider in the limited respect that I have just identified. I am not doing what the defendants wanted, which was to have Ms. Redmond basically able to tell her story without the jury understanding that there has been an avenue of evidence that has been foreclosed to the plaintiffs. And the jury is entitled to know that can properly give rise to an inference that what has been concealed would have been unfavorable. And plaintiffs' counsel will have plenty of opportunity in the course of argument — closing argument — to make whatever they wish of that, and defense counsel will have plenty of opportunity to seek to insulate themselves from that.

Is there anything that is unclear about what I have just dealt with?

MR. FLAXMAN: I have two questions — well, two concerns. The first is that probably we need voir dire questions about social workers and those things, and how do you feel when somebody who talked to a social worker, that you are a social worker, something like that, which if that comes up --

THE COURT: I don't know why. Frankly —

MR. WILENS: I think it's irrelevant.

[14] THE COURT: Remember the only thing that would happen would be, when we talk about what the jury would learn, let's suppose in the examination or cross-examination of Ms. Redmond,

would be that after the incident the Village made arrangements for her to confer with somebody who is characterized — whatever her label is, social worker or whatever you want to call it. And you know that really doesn't bring that aspect into issue. It's not as though the — I don't understand what an attitudinal aspect on that subject would have to do with our lawsuit.

MR. FLAXMAN: Well, I am concerned, if I was a defendant I would try to get before the jury that she hasn't answered these questions because she has this privilege that she has asserted —

THE COURT: No, no. She is not going to get any opportunity to do that, because you know the Court's ruling is what controls that.

MR. FLAXMAN: Okay.

THE COURT: And therefore what the jury is going to hear about is just what I've indicated — and that is, that she and the Village have refused to make those things available.

MR. FLAXMAN: Okay.

THE COURT: The jury is not going to get an opportunity to second-guess on questions of privilege.

MR. FLAXMAN: Okay. The other issue that I am concerned about, and I haven't analyzed it at all, because I was [15] listening and it popped up in my head: if we get a verdict and they are going to appeal, if I was the defendants I would argue that this whole ruling is based on that assertion of privilege, and if the privilege really exists then judgment should be reversed. But I am not — I don't know if that's — I mean the issue —

THE COURT: Actually, you see, it doesn't rest in that sense at all. Remember the point that I have just made in which I ascribed the matter to Ms. Redmond's choice. Ms. Redmond indeed had the opportunity — assume that there was some kind of a privilege for a moment, as I have rejected. There's no reason in the world that Ms. Redmond, who after all is a litigant here, would not be in the position to waive that. Why would you suppose that I asked Ms. Redmond in the March hearing whether she would instruct Ms. Beyer to make these things available?

MR. FLAXMAN: But if there is a valid privilege which she could be entitled to and assert that privilege and suffer the consequences.

THE COURT: I am not sure that she would be entitled to do that in the face of the idea that she is being asked simply "What did you tell?" for purposes of seeing whether it is consistent with the later statement. I am not going to rule in advance on what may happen if the case goes in one direction. It will ultimately, I suppose, be for the Court of Appeals to deal with that. There is nothing in what I am doing that really [16] treats with that. My sense is that even if you may assume the privilege, that doesn't necessarily resolve the matter in that fashion, for some of the reasons that I have indicated — and there may be others. But that's for the future. * * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[title omitted in printing]

EXCERPT OF PROCEEDINGS AT TRIAL

* * *

[322]

(Whereupon the following proceedings were had at side-bar out of the hearing of the jury:)

MR. FUTTERMAN: Your Honor, this relates to the matter came up the other day concerning personal problems of the witness. We ask the witness at her deposition whether she was experiencing any personal problems on the day of this shooting and she denied that. Karen Beyer testified that in fact the witness disclosed to her that she was suffering from personal problems on the day of the shooting. We think that goes to the issue of her ability to perceive and understand what was going on and her state of mind.

[323]

THE COURT: Yes.

MR. ROGUS: Your Honor, you know my position. It's not my intention today to make a three-ring circus out of this. It is not my intention to pound on my table and carry on. But you know that I have disagreed with your ruling from day one. It is my intention to object for the record to anything happening at that trial with respect to communications between my client –

THE COURT: I understand that.

MR. ROGUS: – and Ms. Beyer.

THE COURT: That's a standing objection. Okay?

MR. ROGUS: And the other thing is --

THE COURT: Of course, that really, I must tell you doesn't even go to the issue of personal problems that she may have. That is the question of whether she may have discussed those with Ms. Beyer is really separate and apart from the question whether there is a good-faith basis for inquiring of here her whether she was suffering from other distracting problems that affected her perceptions and affected her ability to conduct herself in the way that a reasonable police officer could conduct himself or herself at the time. That's really a separate issue.

Now whether then the further inquiry can be made if she denies the existence of personal problems, whether she did or did not discuss matters of that nature with Ms. Beyer that [324] brings us to the thing that you have just pointed to, and I have already held that a social workers -- and I guess I don't have to repeat the holding that I have dealt with it at some length -- is not someone for whom the privilege exists that extends to professionals who are categorized either doctors or MDs, practitioners or psychiatrists, I don't have to deal in a sense with the questions about whether that gets extended to psychologists. But I have rejected the idea that because some lobby may have created that sort of insulation under Illinois law that federal courts are bound by it. Social workers do not stand in the same stead and the same professional aspect although may characterize themselves that way, they create a self kind of certification process, but I have already ruled as far I am concerned and that stand for this trial. And you have got your record created. And I recognize that you don't have to keep repeating the objections. I will treat that as a standing objection.

MR. ROGUS: I have basically two related secondary objections. The First one, once again, it is my contention that the type of testimony, the type of information, that counsel seeks to inquire into, is the type of state of mind information that I respectively submit is simply not relevant to the objective reasonableness analysis. On that ground I would object to any inquiry. Part B of that submission to you is --

THE COURT: Is the acting wilful and wanton also?

[325]

MR. ROGUS: That's the state claim.

THE COURT: Yes. And doesn't that question also bear on the wilful and wanton?

MR. ROGUS: The fact that she may have been having personal problems?

THE COURT: No, no. The fact that she conducted herself in a particular way at a time when she was not in a position to is their argument. I am not subscribing to it. I am just characterizing which is what I have to do for relevance purposes, because he was not in a position to be exercising the objective judgments that the reasonable police officer would exercise. That's an aspect of a claim of willful and wanton misconduct, particularly if someone understands and perceives that she is having problems. And so you know it seems to me in relevance terms it's in the case. I recognize that the standard for 1983 is of course that of the objective police officer. And for that purpose subjective aspects are not in the case. But there is this case and added claim. And it seems to me it's relevant to the added claim.

MR. ROGUS: Part B of my position is even if relevant prejudice to my client's position in this case far outweighs any possible relevance that this evidence may have. And according to --

THE COURT: The issue on that score of course is unfair prejudice. Our Court of Appeals has commented frequently [326] if evidence is not prejudicial it's not admissible. The question that we deal with then is whether we have unfair prejudice. And what I have in that sense is that here we have a claim that if evidence of this nature is excluded becomes highly prejudicial to the ability to assert a claim that can be asserted in good faith. If the evidence is admitted it becomes highly prejudicial in the sense that I have talked about, not unfairly prejudicial, but highly prejudicial to the defendants. What that means is that it's probative. That is the reason that our Court of Appeals has said that the test is not one of prejudice but unfair prejudice. It may be considered as highly probative, and under the circumstances -- let me ask that.

I don't know for a minute what the personal problems or claimed personal problems were. But the inquiry into whether we had an officer who was at that time not in the position to exercise the judgments that a reasonable police officer confronted with the circumstances would exercise when that has resulted in a death strikes me as really odd to argue unfair prejudice. I suppose the ultimate unfair prejudice if in fact she he was not functioning properly, has been suffered by the decedent. So you know, I don't find a lot of comfort in the idea of saying, "Well, the evidence is unfairly prejudicial." If may be probative, but that's because it may -- and it may be powerful, but I don't know that. But I am not going to bar it in those terms for the reasons I have stated.

[327]

MR. ROGUS: It was my understanding from your earlier rulings — and perhaps once again we will continue to have a professional disagreement on this — that you had set parameters within which counsel could inquire and that those parameters did not include inquiry into matters of personal problems.

THE COURT: Remember what we are dealing with, we were dealing with a situation in which ultimately, you know she was given every opportunity to permit discovery, and the discovery has been done, we have no way -- no way of knowing whether those things would or would not have been subject to possible limitations, I have no way of knowing that. But the reason I have no way of knowing that is that I have been prevented from knowing that by your client's conduct. And you know, the idea -- that's essentially like saying that she ought to cry for mercy because having killed her parents she's an orphan. She's the one who has made it impossible for me to make the kind of calculated and careful judgment that I would like to make in any situation by being confronted with all of the facts. Those facts have been withheld from me just as they have been withheld from the plaintiffs, just as they going to be withheld from the jury. So the idea of saying, "Well, let's set up parameters," I am not in a position to guess, and I am rejecting that.

MR. ROGUS: Your Honor indicated that the jury would be informed certain matters have been withheld.

THE COURT: That's right.

[328]

MR. ROGUS: And this is an end run around that is my contention.

THE COURT: No.

MR. ROGUS: That things are not going withheld and they are going to be dangled in front of the jury, and then on top of it the jury is going to be told that things are being withheld from them.

THE COURT: I don't know. If there are personal -- she will, as I understand it, she will decline to say that there is anything that she was suffering from in terms of personal problems if she testifies consistently with her deposition, and they may be stuck with that and then with dealing the jury that an inference can be drawn but that's it.

MR. ROGUS: Okay.

THE COURT: Okay. (Whereupon the following proceedings were had in open

* * *

[339]

MARY LU REDMOND, PLAINTIFFS' WITNESS, DULY SWORN:

THE COURT: Please be seated. You may proceed, Mr. Futterman.

DIRECT EXAMINATION:

BY MR. FUTTERMAN:

Q. Please state your full name?
A. Mary Lu Redmond.

Q. How old are you?

THE COURT: Could you spell the first name, please, for us, Ms. Redmond?

THE WITNESS: Mary, common spelling, Lu, L-u.

Q. How old are you, Ms. Redmond?
A. 32.

Q. On June 27, 1991 you were a police officer with the Hoffman Estates Police Department, is that correct?
A. Yes, I was.

Q. And you had been there about five years, is that right?
A. Correct.

Q. And on that date you shot and killed Ricky Allen, is that correct?
A. Correct.

Q. Did the Hoffman Estate Police Department on that date [330] have any policy with respect to deadly force?
A. Yes, they did.

Q. Were you aware of that policy?
A. Yes, I was.

Q. Had you received a copy of that policy?
A. In my general orders.

Q. Did you sign and acknowledge that you had read that policy?
A. Yes, I did.

Q. Were you aware on June 27th, 1991 that as a police officer in Hoffman Estates you were allowed to use only the minimal amount of force necessary to preclude any physical attack either against a police officer or another person?
A. Can you repeat your question, please?

Q. Yes. Were your aware on June 27th, 1991 that as a Hoffman Estates police officer you were allowed to use only the minimum amount of force necessary to preclude any physical attack against a police officer or another person?
A. Yes.

Q. Were you aware on June 27th, 1991 that you were to use only reasonable means of apprehension or defense and exhaust those before resorting to deadly force?

A. Yes.

Q. Were you aware on June 27th, 1991 that the use of deadly force was only justified as a last resort to protect a police [331] officer or another person from death or great bodily harm?
A. Yes.

Q. Were you aware on June 27th, 1991 that under the Hoffman Estates Police Department's policy on deadly force that definition of deadly force included the pointing or firing of a firearm at a person?
A. Can you repeat that?

Q. Were you aware on June 27th, 1991 that under the definition of deadly force used by Hoffman Estates Police Department that one of the elements defined was pointing a firearm in direction of another person?
A. One of the elements?

Q. Yes.
A. It was my understanding that.

Q. Your Honor, may I ask the that witness answer that question "yes" or "no"?

THE COURT: I will permit might the witness to answer. It was your understanding that what?

THE WITNESS: That deadly force can only be used if another person —

THE COURT: Now wait. Then I think you have misunderstood the question, Ms. Redmond.

THE WITNESS: Perhaps I did.

THE COURT: The question was whether the definition of deadly force including pointing a firearm at another person? [332]

THE WITNESS: Yes.

THE COURT: Were you aware of that?

THE WITNESS: Yes.

BY MR. FUTTERMAN:

Q. And were you aware if you pointed a firearm at an unarmed person you were using deadly force?

A. I think I misunderstood your first — your last question.

Q. Do you want to change your answer?

A. The way I interpreted the question was if somebody pointed a firearm at somebody else.

Q. Right.

A. Right.

Q. If you as a police officer on June 27, 1991 —

A. Uh-huh —

Q. — pointed a firearm at another person under the definition of the Hoffman Estates Police Department policy on deadly force were you using deadly force?

A. To point a firearm at somebody — I am still not sure. Can you rephrase the question?

THE COURT: Ms. Redmond, I think that question has been stated in a forthright and manner that's capable of a "yes" or "no" answer. Were you aware that under Hoffman Estates Department definition of deadly force that pointing a firearm at another person was within that definition?

THE WITNESS: Yes.

[333] BY MR. FUTTERMAN:

Q. And you knew that was the definition of deadly force even if you pointed the firearm at an unarmed person isn't that correct?

A. That's correct.

Q. Did you know Ricky Allen prior to June 27th, 1991?

A. Yes, I did.

MR. ROGUS: Your Honor, I think with respect to that question I will object on grounds of relevancy.

THE COURT: Counsel, let's confer at side-bar.

(Whereupon the following proceedings were had at side-bar

out of the hearing of the jury:)

THE COURT: Unless there is something about that knowledge that enters into or arguably enters into the matrix of the reasonable police officer with that knowledge, how is it relevant?

MR. FUTTERMAN: She's previously denied that she knew Ricky Allen prior to June 27, 1991.

THE COURT: So that you were expecting a "no" answer?

MR. FUTTERMAN: Right.

THE COURT: And she has just given a "yes" answer?

MR. FUTTERMAN: Right.

THE COURT: Counsel, is only really attempting to establish a foundation that a reasonable police officer did not have as one of the circumstances any knowledge of this [334] defendant — of Ricky Allen, rather? And that — now wait a minute. That's a perfectly proper question, because basically what he was trying to do was to eliminate something as one of the factors. Now she has given a "yes" answer. I have to permit it. The question was a proper question given counsel's legitimate and reasonable expectations of the answer. Remember he was doing it basically to show that was not one of the factors in an equation of the reasonable police officer in her circumstance — if she had known him, for example, and known him to a brawler or whatever it is, that might be said to part of the — part of what the reasonable police officer in this situation would have as part a matrix for action. Counsel expected a "no" answer, and he is entitled now to pursue it. I have to overrule objection on relevance grounds because the question, given the expected answer, is certainly a relevant one.

(Whereupon the following proceedings were had in open

court in the presence and hearing of the jury:)

THE COURT: That objection has been overruled. Jesse, I think the question was answered. Do you want to read back the question and answer, please?

(Record read)

BY MR. FUTTERMAN:

Q. On the day of the shooting, June 27, 1991, were you having any personal problems in your life? [335]

MR. ROGUS: For the reasons that I indicated at side-bar as well as incorporating all my previous argument, I object,

THE COURT: That objection has been noted and I told you at side-bar that was going to be a standing objection. So you don't need to repeat it. It's overruled.

Did you hear the question?

THE WITNESS: Yes.

No, I was not.

BY MR. FUTTERMAN:

Q. Did you ever tell anyone that you were having personal problems on June 27, 1991?
A. No.

Q. Do you know a woman named Karen Beyer?
A. Yes, I do.

Q. When you were an employee of Hoffman Estates was she also an employee of Hoffman Estates?
A. She was employee of the Village?

Q. The Village of Hoffman Estates?
A. Correct.

Q. And after the shooting you had number of meetings with Karen Beyer, didn't you?
A. Yes, I did.

Q. And in fact you began to meet with her approximately a week or so after the shooting on the average of two to three [336] times per week, didn't you?
A. Approximately.

Q. And you had discussions with her about the shooting in some of those meetings, isn't that correct?

A. That's correct.

Q. And those discussions continued at least until January of 1992, isn't that correct?
A. Approximately. I don't know the exact date offhand.

THE COURT: Try to keep your voice up so all of the jurors can hear you. All right?

THE WITNESS: Okay.

THE COURT: You said "approximately." I am sorry. I didn't hear the answer.

THE WITNESS: I don't know the exact date but approximately that would be about the correct time.

BY MR. FUTTERMAN:

Q. And you told Karen Beyer that you couldn't remember pulling the trigger when you shot Ricky Allen isn't that correct?
A. I don't recall what my contents of the conversations I had with Karen Beyer were.

Q. You had approximately 50 to 75 conversations with her between July of 1991 and January of 1992, didn't you?
A. Yes.

Q. Is it your claim that you cannot recall any conversation [337] with Karen Beyer in which you related a fact to her about the shooting?
A. I know I related the facts of the shooting. The exact conversations I cannot recall. I would — I can't recall the exact conversations that I had with her no.

Q. Is it your testimony, Ms. Redmond, that you can't recall discussing the shooting incident with Karen Beyer on your first visit?

MR. ROGUS: I object to that question, your Honor. I think the witness —

THE COURT: That objection to the form of that question is sustained. But the objection as to the question itself substantively is overruled.

BY MR. FUTTERMAN:

Q. Is it your claim, Ms. Redmond, that you are unable to recall any discussion with Karen Beyer of the shooting incident on your first conversation with her?

A. I know I discussed the shooting with her, but I don't recall what the conversations were. I can't recall exactly what I said. I can recall the shooting but to recall the conversations is something different.

Q. Ms. Redmond, are you claiming that you cannot recall discussing with Karen Beyer the shooting on your first visit with her?

A. I don't recall the conversations we had. [338]

Q. The reason you went to see her was because of the shooting, is that correct?

A. That's correct.

Q. Do you claim that you cannot recall any discussions with Karen Beyer about any memory loss that you may have suffered about the incident?

A. I don't recall.

Q. Is it your claim that you can't recall telling Karen Beyer that you shot someone to death?

A. I can't recall.

Q. Is it your claim that you can't recall telling Karen Beyer how you happened to arrive on the scene of the shooting on June 27, 1991?

A. I can't recall the exact conversations I had with her, sir.

THE COURT: You are not — Ms. Redmond, let me just clarify it for you. You are not being asked to recall specific — the exact conversation, that's really not the thrust of the question. You have been asked about the subject matters.

And so that's what you are being asked to deal with, not whether a particular word was used or particular word was not used. Do you understand the question in that sense?

You should understand that's how Mr. Futterman — each of Mr. Futterman's questions up to this point has been framed, not in terms of exact verbatim recollection of the [339] conversations, but he has dealt with the subject. All right?

THE WITNESS: Yes, your Honor.

THE COURT: All right. Do you want to read the last question back? I think Ms. Redmond may have misunderstood.

(Record read)

A. I can't recall.

BY MR. FUTTERMAN:

Q. Is it your claim that you can't recall telling Karen Beyer anything about two black women who approached your car when you arrived at the scene on June 27, 1991?

A. I can't recall.

Q. Is it your claim that you can't recall telling Karen Beyer how you came to draw your gun on June 27, 1991?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer at anytime after June 27, 1991 your description of the crowd of blacks that you saw near the entrance to the apartment building at 957 Grand Canyon when you arrived on the scene?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer who you saw coming out of the door of the entrance to the apartment building at 957 Grand Canyon?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall [340] discussing with Karen Beyer your description of what you saw on June 27, 1991 when Thomas Jamell come out of the building that day?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer what you believe you saw Ricky Allen doing when you shot him to death on June 27, 1991?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall ever discussing with Karen Beyer the decisionmaking process that you went through on June 27, 1991 when you killed Ricky Allen?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer what happened at the scene immediately after you shot Ricky Allen?

A. I can't recall.

Q. It is your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer the knife that you claim you saw in Ricky Allen's hands?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer this shooting incident with other officers employed by the Hoffman Estates Police Department?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with [341] Karen Beyer statements made by other people that on the day in question the knife found at the scene was observed being moved by Hoffman Estates police officers?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer whether any officers of the Hoffman Estates Police Department informed you they would do whatever is necessary to protect you regarding this incident?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer the results of any investigations conducted by the Hoffman Estates Police Department concerning the shooting and killing of Ricky Allen?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer how your involvement in the shooting incident such as the one that took place on June 27, 1991 might affect your memory?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer any statements by her that there may be

some memory gaps in your memory regarding the shooting incident?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall [342] discussing with Karen Beyer whether you had any doubts about your conduct on June 27, 1991 when you shot and killed Ricky Allen?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer how you aimed your weapon and shot Ricky Allen?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer whether you pointed your weapon at any other person at the scene before or after you shot Ricky Allen?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer what you saw or what you think you saw when Ricky Allen and Thomas Jamell were outside of the apartment building?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer whether in fact you were able to see what Ricky Allen was doing as he moved through the crowd of blacks that were in front of the apartment building on June 27, 1991?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with Karen Beyer how far away from Thomas Jamell you thought Ricky Allen was when he comes out of the building on June 27, 1991?

A. I can't recall.

Q. Is it your claim that you can't recall discussing with [343] Karen Beyer what you said to the crowd of blacks that you saw in front of the building when you got of your squad car and started approaching the entrance 957 Grand Canyon on June 27, 1991?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer what you claimed you said to Ricky Allen after he came out of the building at 957 Grand Canyon on June 27, 1991?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer your ability to make quick decisions?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer the decision you made to shoot and kill Ricky Allen on June 27, 1991?

A. Can you repeat that, please?

Q. Is it your claim, Ms. Beyer —

THE COURT: Ms. Redmond.

Q. I am sorry. That you don't recall discussing with Karen Beyer your ability to make a decision to shoot and kill Ricky Allen on June 27, 1991?

MR. ROGUS: That was asked and answered, I thought, Judge.

THE COURT: No, this is a separate question. The [344] earlier one that was asked and answered was about an ability to make quick decisions. Objection is overruled.

MR. ROGUS: So the record is clear, your Honor, it is my understanding that respect to my stated objection before that all of these questions Mr. Futterman is now asking or encompassed within my standing objection.

THE COURT: Yes, that's been made plain enough. And the objection — the standing objection has been overruled.

BY MR. FUTTERMAN:

Q. Do you have the question, Ms. Redmond?

A. Yes, I do. I can't recall.

Q. Is it your testimony — strike that. Do you claim, Ms. Redmond, that you can't recall discussing with Karen Beyer the general subject of your memory about this incident?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer your emotional state immediately prior to your pulling the trigger on your gun and killing Ricky Allen?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall discussing with Karen Beyer why you felt it was necessary to fire your gun at Ricky Allen on June 27, 1991?

A. I can't recall.

Q. Is it your claim, Ms. Redmond, that you can't recall [345] discussing with Karen Beyer your recollection of blood flowing from the mouth of Rick Allen after you shot him to death?

A. I can't recall.

Q. Were you aware that Karen Beyer made notes of the conversations that she had with you?

A. I am aware of that now.

Q. And you don't want her to produce those notes, do you?

A. No.

Q. In fact you won't authorize her to produce those notes if such authority is needed from you, is that correct?

A. That's correct.

Q. And to this very day you won't authorize her to turn over those notes, would you?

A. That's correct.

MR. FUTTERMAN: No further questions, your Honor.

THE COURT: Counsel, may we confer for a moment at sidebar?

(Whereupon the following proceedings were had at side-bar out of the hearing of the jury:)

THE COURT: I don't have that earlier deposition at hand, but I suspected from the whole line of questions that this was the straight repeat of questions that were posed to Ms. Redmond at her deposition, is that right?

MR. FUTTERMAN: At the hearing and at her deposition.

THE COURT: Yes. Are you seeking to introduce those [346] as reflections of the same lack of recollection at an earlier time closer to the incident? I wanted to know when we are going to be through with her so far as your case is concerned? My reason for asking that is I don't want to have her essentially called back, for example, a second time in connection with your case-in-chief, simply, for example, you know that those things are basically, if they are admissible are simply admissible because of party admissions, you understand? So I wanted to find out what your — well, maybe you haven't thought that one through, so let me pose — at this point you had said that you thought you were probably going to simply reserve —

MR. ROGUS: I have one or two quick questions but, I will be reserving.

THE COURT: All right. Well, then as far as this is concerned there won't be a need on your part to be calling her for purposes of identifying those things because they are — to the extent they are admissions, they are admissible basically independently. Okay.

MR. FUTTERMAN: I think at some point for the closing our case, we will just move for the admission of those questions and answers from the deposition and the hearing. I could ask her one more questions. I suppose I could ask one more question, which is: You were asked those question and gave those answer on two prior occasions in this case.

MR. ROGUS: I am going to object to that, your Honor. [347]

THE COURT: Well, the issue is — the purpose for which these things are offered is in terms of a claimed lack of credibility, I think, as I understand it. Okay. And therefore the same questions and responses at a date closer to the incident would bear on credibility. So what's the basis for the objection.

MR. ROGUS: Questions as to whether she recalls being asked all of these questions about whether she recalls —

THE COURT: No, no, no, no, no, no, no. The question whether was she asked the same questions and did she respond in the same manner on later occasions, I am not sure that's needed given the fact that, you know, she has been statements — she has given statements under oath, and those are basically independently admissible to the extent that they are — you know, that they pass the evidence test, they are party admissions. I suppose that maybe instead of asking whether asked the same questions and answers, maybe simply ask her did she give answer under oath on two — on a couple of occasions identifying that, and that's it.

MR. ROGUS: That would be fine. Counsel is able to point to every one of these questions that he just put to the witness as having been put to her previously.

THE COURT: Well, he doesn't have to. That's why I say all he has got to do is to get a confirmation that she was — that she had given sworn testimony on a couple of prior [348] occasions. The contents of those, whether those are admissible, is a separate issue. Okay.

MR. ROGUS: Yes.

(Whereupon the following proceedings were had in open court in the presence and hearing of the jury:)

THE COURT: Mr. Futterman, do you have —

MR. FUTTERMAN: Just a couple more questions.

THE COURT: Yes.

BY MR. FUTTERMAN:

Q. Ms. Redmond, on three separate prior occasions you have given sworn deposition testimony in this case, is that correct?
A. Yes.

Q. And on two other prior occasions you gave sworn testimony in two proceeding in this case, is that correct?
A. Yes.

MR. FUTTERMAN: Thank you. No further questions.

CROSS-EXAMINATION:

BY MR. ROGUS:

Q. Mary Lu, for now I just want to ask you one or two quick follow-up question. Mr. Futterman had been asking you some questions about your knowledge of the Hoffman Estates Police Department policy with regard to the use of deadly force. Back on June 27, 1991 were you aware that policy prohibited you from firing warning shots?

A. Yes. [349]

Q. With respect to all of these meetings that you have indicated that you have had with Karen Beyer, do you know as you sit her today how many such meetings you had?

A. Not offhand.

Q. Have you had more than 50?

A. More than 50.

Q. And over how long a period of time were those meetings held?

A. Approximately since July '91 to perhaps February of '92, somewhere in that range.

MR. ROGUS: Thank you. I have no further questions of the witness at this time, your Honor, with the understanding that I reserve the right to call her in my case.

THE COURT: You reserve the right to recall, of course. Any further redirect examination?

MR. FUTTERMAN: Yes, your Honor, just a question or two.

REDIRECT EXAMINATION:

BY MR. FUTTERMAN:

Q. As I understand your testimony you do remember when you started seeing Ms. Beyer and when you stopped seeing her, is that correct?

A. That is correct.

MR. FUTTERMAN: No further questions, your Honor.

THE COURT: Thank you very much. You are excused at [350] this time.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Plaintiffs' next witness.

MR. FUTTERMAN: Yes, your Honor. We are asking her to come in.

THE COURT: All right.

MR. FLAXMAN: Our next witness is Karen Beyer, who they are getting.

THE COURT: Thank you.

Step up here, please, to be sworn?

(Witness Sworn)

KAREN BEYER, PLAINTIFFS' WITNESS DULY SWORN

DIRECT EXAMINATION:

THE COURT: Mr. Flaxman, you may proceed.

MR. ROGUS: Your Honor, not to cut off my esteemed opponent, but I don't want to renew my objection at that point before this witness begins testifying for all of the reasons that I have stated at side-bar, incorporating all of my previous references I submitted to the Court.

THE COURT: Well, the objection in that sense is of course premature. You have stated your position with respect to certain aspects of the appropriate testimony, and those objection stand as a standing objection. But the objection as to calling a witness is both inappropriate and premature, and [351] that is of course overruled. Now, Mr. Flaxman, you may proceed.

BY MR. FLAXMAN:

Q. Thank you, Judge.

Could you state your name, please, and spell your last name?

A. Yes. My name is Karen Beyer, B-e-y-e-r. Karen within a K.

Q. And back in July of 1991 were you employed by the Village of Hoffman Estates?

A. Yes, I was.

Q. And in the course of your work for the Village of Hoffman Estates did you have an occasion to meet with the defendant Mary Lu Redmond?

A. Yes, I did.

Q. And did you meet with Ms. Redmond on more than one occasion?

A. Yes.

Q. Did you meet with her on more than 50 occasions?

A. Probably.

Q. And when you met with here did you ever make any notes of your conversations with her?

A. Yes.

Q. And when you made notes of your conversations with her did you write down some of the things that she told you?

A. On occasions. [352]

Q. And as you sit her today, is it fair to say that you remember some of the things that you she told you?

A. Yes.

Q. Do you remember that she told you that she had been having personal problems about the time she shot and killed Ricky Allen?

A. Yes.

Q. And did you make a note of that? Did you right that down anywhere?

A. Not specifically in that way, no.

Q. Well, did you write down anything that relates to what she told you about the personal problems she was having at the time she killed Ricky Allen in July of 1991?

A. I don't believe so.

Q. Okay. Now did you talk with Mary Lu Redmond about what happened, what she was doing at the time she killed Ricky Allen in any of those 50 sessions?

A. Yes.

Q. And did you write down any of the things she told you about the incident when she killed Ricky Allen?

A. I did not write down any of the things that she specifically told me.

Q. Well, did you ever write down that she told you that she could not remember pulling the trigger?

MR. ROGUS: I object to that question, your Honor, [353] based on the witness' last answer to the last question.

THE COURT: That objection is overruled. This examination, I should add, is permissible under Rule 611. And accordingly the objection is overruled.

THE WITNESS: Yes. At one point in time she did say that to me. She was concerned about details like that.

Q. Okay. And was she able to recall details of the incident when spoke with you in those 50 sessions?

A. Yes. And she even later recalled pulling the trigger.

Q. Did she ever tell you, "I can't recall how I got there"?

A. No.

Q. Did she ever tell you, "I can't recall what the people were doing when I got there"?

A. No.

Q. Did she ever tell you that she can't recall how far the two men were away from each other when she shot and Ricky Allen?

A. We never talked about that specific thing.

Q. Now when you wrote down what she told you were those on papers that had been provided to you by the Village of Hoffman Estates?

A. Yes.

Q. And those papers belong to the Village of Hoffman Estates, is that right?

A. My belief is they belong to the client and to the therapist. [354]

Q. Do you have those notes with you, ma'am?

MR. ROGUS: I am going to object to this, your Honor. May we have a side-bar, please?

THE COURT: Just a moment.

(Whereupon the following proceedings were had at side-bar out of the hearing of the jury:)

MR. ROGUS: If I may —

THE COURT: Just a moment.

(Pause)

Are we going to clear up — and I will get back to our objection in just a minute. Are we going to clear up this business about therapist, you know a self-characterization or not? I am very troubled by —

MR. ROGUS: He raised the answer, your Honor.

THE COURT: No, he didn't invite that answer. But in any event, what is the objection?

MR. ROGUS: The objection is —

THE COURT: He asked whether she has got the notes with her?

MR. ROGUS: Correct. The issue here is previous refusal to turn over those records, therefore giving rise to this allowance to the jury to draw and adverse inference if they so see fit.

THE COURT: Right. Are you suggesting that she is prepared now? [355]

MR. ROGUS: I don't know if that's what counsel is getting at it. It is not a discovery exercise, we are now on trial.

THE COURT: Let me ask you. I guess that I commented when I heard about this that I thought the positions had sort of been turned around. Are you inviting her to produce these now?

MR. FLAXMAN: Yes, Judge, I am. I think that there is a — I think the jury is entitled to know that the refusal to turn over these papers is a decision of Hoffman Estates and it's continuing up to the time of trial, are these documents that we are laying the foundation for — Jesse is looking at me, I will slow down — that she made contemporaneously with conversation that contains statements and that weren't given to us up to this very moment.

MR. ROGUS: The problem we have, your Honor, is that she is no longer with the Village, and I believe she has the records, and those records are now within her right to control on the decision of whether to turn over or not in. You are trying to create an inference that the Village is stonewalling on an issue based on what someone who is not —

THE COURT: That's why I say it seems to me maybe the positions have turned around. If she has got them with her then I am not sure that question is now relevant, and that your objection, I think, is a sound one. If counsel is representing that to his knowledge, the Village does not have these records [356] at this point, then I think his objection to the question whether she has them now is a proper objection.

MR. FLAXMAN: Well, I didn't hear him represent that the Village doesn't have the papers. That might be something that we can take up out of the presence of the jury.

MR. WILENS: I can represent that I have spoken with Peter Berger who is the Clerk for the Village of Hoffman Estates and he will testify that the notes are no longer there.

THE COURT: Okay. If that's so, I am going to sustain the objection, because it seems to me that the question of her as to whether she has those notes is really at that point inappropriate in terms of the relevance to our case. Our case involves Hoffman Estates as a defendant and Mary Lu Redmond as a defendant. And I think that's a proper objection, and not Karen Beyer.

MR. FUTTERMAN: She previously testified that those notes belonged to the Village of Hoffman Estates.

MR. ROGUS: She also testified —

THE COURT: That's all right. If you want to — if you want to bring that in by way of impeachment you may do that, so that that's proper. But I think that the objection is still a sound objection.

MR. FLAXMAN: Could we take a morning break an instruct the witness not to refer to herself as a therapist, and reject the volunteered answer? [357]

THE COURT: Well —

MR. FLAXMAN: After a few more questions.

THE COURT: Well, you can ask her what her occupation is. You don't want to do that?

MR. FLAXMAN: I don't want to do that. I didn't want her to say she was a therapist, but she wanted to volunteer that.

MR. ROGUS: That's what you get for lobbing a fat one, counsel.

THE COURT: Well, on the contrary. You know, you can't really expect that somebody is — you can't legitimately expect that somebody is going to do that in those terms. I think that it is better to the matter clarified on the record, not that she just stop referring to herself that way. She has also already pulled that trigger and that bullet can't be stuffed back into the muzzle. The appropriate way is to ask her, I think what is her occupation. As I understand it, she is — or can you read — so that the matter — you can ask is she a social worker, and I will simply tell the jury that the self-characterization of therapist is something that they are not to take into account, and it's really inappropriate.

(Whereupon the following proceedings were had in open

court in the presence and hearing of the jury:)

THE COURT: That objection is sustained.

[358] BY MR. FLAXMAN:

Q. Do you remember testifying at an earlier proceeding in this case when you were asked —

THE COURT: Well, first that's the first question. Do you remember testifying at an earlier proceeding in this case?

THE WITNESS: Here in a courtroom, yes.

BY MR. FLAXMAN:

Q. And do you remember at that earlier proceeding telling us that those records were the property of the —

THE COURT: Mr. Flaxman, question and answer for the witness. Okay.

MR. FLAXMAN: Okay.

THE COURT: And refer to the transcript page, if you will, for counsel's information.

MR. FLAXMAN: At page 9 of the March transcript.

Do you remember being asked this question and this answer:

"Question: Did you prepare notes in connection with

your interview of Mary Lu Redmond?"
And you told us "Yes."
And then you were asked, "Is it correct" —

MR. ROGUS: Counsel, that wasn't on that page, was it?

Your Honor, I just want to clear up the question he's put to the witness isn't on that page that he is referring to.

MR. FUTTERMAN: At page 10.

MR. ROGUS: Page 10. Thank you. [359]

MR. FUTTERMAN: At page 10.

"Did you prepare notes in connection with your interviews with Mary Lu Redmond?" and you answered "Yes."

Do you remember that question and that answer?

MR. ROGUS: The line number on that, counsel?

MR. FLAXMAN: Line 10. Do you remember that question?

MR. ROGUS: Excuse me. Are you looking at this? Please show me where that is.

MR. FLAXMAN: I apologize, but we are having a technological breakdown.

Page 9. Line 10.

"And did you prepare notes in connection with you interview of Mary Lu Redmond?" And the answer was "Yes."

MR. ROGUS: May I have my transcript back?

MR. FUTTERMAN: Sure.

Do you remember that question and that answer?
A. Yes.

Q. And then you remember the next question and answer:

"Is it correct that those notes are the property of the Village of Hoffman Estates?"

Do you remember that question?
A. Yes.

Q. And do you remember what your answer was then?
A. I recall —

THE COURT: Mr. Flaxman, the proper way to deal with [360] that is to read the question and answer to the witness and ask whether the witness recalls that question being asked and that answer being given. It is not a memory test in that sense.

BY MR. FLAXMAN:

Q. All right. The question:

"Is it correct that these notes are property of the Village of Hoffman Estates?
Answer: I would assume so. They are also the property of the client." Do you remember that question and that answer?

THE WITNESS: Yes, I remember it was a question

THE COURT: That's the only — the answer to that one is either "yes," "no," or "I don't remember."

THE WITNESS: Yes.

BY MR. FLAXMAN:

Q. Now are you currently employed by the Village of Hoffman Estates?
A. No.

Q. Do you remember back at that March hearing the next question on line 17, counsel.

"So it is correct that if you stopped working for Hoffman Estates you would leave the notes there?"
And your answer was, "Yes." Do you remember that question and that answer?
A. No. [361]

THE COURT: Counsel are you are prepared to —

MR. ROGUS: I will lend counsel my transcript.

MR. FLAXMAN: Thank you.

BY MR. FLAXMAN:

Q. Can you look at this and tell us what it is?
A. It's a transcript of proceedings March 8, 1993.

Q. And that's the date that you came here to give some testimony in this case, is that right?
A. Right.

Q. And did you sit in the same chair that you are sitting in now?
A. Yes.

Q. And before you testified did you take the same oath that you took today to tell the truth?
A. Yes.

Q. And was the same gentleman sitting here writing down what you were saying as the court reporter?

A. I don't know.

Q. Okay. Well, could look at page 9?
A. Yes.

Q. Line 23?
A. Uh-huh.

Q. And you see that question on line 17:

"So is it correct that if you stopped working for Hoffman Estates you would leave the notes there?" and the answer [362] "Yes."
A. Uh-huh.

Q. And after having looked at that transcript do you recall that question and that answer?
A. I do not recall it, but I am sure if it's written here that it is correct, and I said that.

Q. Okay. Can I have the transcript back?
And when was it that you stopped working for Hoffman Estates?
A. In the end of May of this year.

Q. Okay. Now when you had these conversations with — well let me go back. In the course of this lawsuit when you worked for Hoffman Estates you turned over three pages of your notes to us, is that right?
A. Correct.

Q. And before your turned over those three pages of those notes you crossed out a lot of words, is that right?
A. Yes. Uh-huh.

Q. Were your notes more than three pages? Your total notes that you took the time that you saw Karen Beyer — Mary Lu Redmond. I am sorry.
A. Yes.

Q. And you gave us excerpts of three page, is that right?
A. Yes.

Q. And when you spoke with Karen Beyer those — [363]

THE COURT: That is Mary Lu Redmond.

Q. I am sorry. When you spoke with Mary Lu Redmond those 50 times, did she ever tell you that she couldn't recall show she drew her gun.
A. I don't remember her specifically saying that.

Q. She specifically saying she couldn't recall?
A. Correct.

Q. Did she ever tell you that she couldn't recall the crowd of black people that came up to her?
A. No.

Q. Did she ever tell you that she could not recall who she saw coming out of the apartment building?
A. No.

Q. Did she ever tell you that she couldn't recall what she saw at the scene?
A. No.

Q. Did she ever tell you that she couldn't recall what she believed Ricky Allen was doing at the time she shot him?
A. No.

Q. Did she ever tell you that she couldn't recall anything about the incident?
A. No.

Q. When she talked to you she had a very clear recollection of what she believed she did that day, is that right?
A. Yes. [364]

Q. She didn't seem to be suffering from any memory lost when she was talking to you, is that right?
A. As I said before she was preoccupied with very small details that most people would have no concern if they could not recall. But at times she worried about very — not recalling very small details.

Q. Now your profession is a social worker, is that correct?
A. Yes. I am a licensed clinical social worker in the State of Illinois.

Q. Okay. And those notes that you took during those conversations are those the kind that you think would help Mary Lu Redmond remember what she told you?

A. Some of the content of those notes would help her, yes.

Q. Okay.

I have nothing further.

THE COURT: Mr. Rogus.

CROSS-EXAMINATION:

BY MR. ROGUS:

Q. When you left your employment with Village of Hoffman Estates did you take those notes with you?

A. Yes.

MR. ROGUS: Thank you. No further questions.

THE COURT: Anything else, Mr. Flaxman?

MR. FLAXMAN: Nothing, Judge.

THE COURT: Thank you. You are excused.

* * *

[361]

MARY LU REDMOND, DEFENDANTS' WITNESS PREVIOUSLY SWORN:

THE COURT: Ms. Redmond, you recognize that you are still under oath?

THE WITNESS: Yes.

THE COURT: Mr. Rogus, you may proceed.

MR. ROGUS: Thank you, your Honor.

DIRECT EXAMINATION:

BY MR. ROGUS:

Q. Mary Lu, I want to direct your attention back to June 27 1991. I believe you've already indicated you were employed as a police officer by the Village of Hoffman Estates on that date, correct? [372]

A. Yes.

Q. What was your rank?

A. I was a patrol officer.

Q. And as a patrol officer what were your duties and responsibilities.

A. Patrol the area I was assigned, receive any calls that I might have that gotten from the dispatch.

Q. As a patrol office do you work a particular shift?

A. Yes.

Q. And in Hoffman Estates at that time did the shifts rotate or did you always work the same shift?

A. At that time the shifts rotated together every 28 days.

Q. On the particular date that we are talking about, June 27, 1991 what shift were you working?

A. I was working the second shift which would be days.

Q. And days would consist of from when until when?

A. It was the summer, so that would have been 0740 hours to 1600 hours.

Q. Okay. Now for those amongst us who don't talk in military time all the time what does 0740 hours mean?

A. It means 7 a.m. to 4 p.m.

Q. Okay. At sometime on June 27th, 1991 did you have occasion to report to the Grand Canyon Estate Apartments?

A. Yes.

Q. How was it that you came to go to the Grand Canyon States [373] Apartments?

A. I was assigned a call along with Officer O'Keefe of a fight in progress.

Q. How were you assigned that call?

A. Through the telecommunications, the dispatcher.

Q. Where were you when you received that call?
A. I was on Grand Canyon — check that — I was on Higgins Corridor and I just pulled behind an alleyway and strip mall when I received the call.

Q. Were you in your squad car?
A. Yes.

Q. Is that a marked squad car?
A. Yes.

Q. Were you in uniform?
A. Yes.

Q. Was there anyone else in your squad car with you when you received that call?
A. No.

Q. What did you do after you received that call?
A. I acknowledged that I had heard the call, and I gave my location from where I was at.

Q. How does — how do you acknowledge that you received the call?
A. Well, once I received the call then I have to get back on the — I have to get on the radio and acknowledge that I [374] received the call, telling them where my location is so they know where I am in proximity to where the call was I was assigned to.

Q. Okay. Did you do that?
A. Yes.

Q. And what's the next thing you did then after acknowledging the call?
A. Started to drive to the location.

Q. And how long did it take for you to get to the location from the point that you were at when you got the call?
A. Maybe a minute and a half, two minutes.

Q. Where was it that you drove your squad car to?
A. 957 Grand Canyon Boulevard.

Q. Was there a parking lot area located there?
A. It's an apartment complex, and I pulled into the parking lot.

Q. Now as you were pulling into the parking lot, what if anything did you notice in the area in front of 957 Grand Canyon?
A. As I pulled into the parking lot I noticed two black women who were waving their arms above their head as I was pulling into the entrance of the complex and I saw them running toward my squad.

Q. How was it that they were waving their hands? Can you shows us with a gesture how they were doing it? [375]
A. They were running and they were waving like this in a motion (indicating) above their heads. Obviously I viewed this as to get my attention.

Q. Okay. The record should reflect the witness was just waving both hands at once —
A. Yes.

Q. In an inward and outward fashion?
A. And they were running towards me when they saw my squad.

Q. When you first noticed that was your vehicle still moving or had you completely stopped?
A. I was still moving because the parking lot of that complex you pull right in and you can either go left or go right.

Q. Which way did you go?
A. Right. In the direction of 957 where they were coming from.

Q. Did you eventually stop your squad car?
A. Yes, I did.

Q. Where.
A. I pulled up in front of 957. I had my squad on an angle because there were numerous opening spaces, and I just pulled right up in front.

Q. Did you have the front of your squad car facing the building or away from the building?

A. It was facing the building but it was on an angle. I [376] didn't like park — take the time to pull in or park in a space. It was just open spaces, and I just pulled in on an angle.

Q. When you brought your squad car to a completes stop what is the next thing that you observed, if anything?
A. The women were at my — the two women were at my car at the time when I stopped.

Q. What do you mean "at your car?"
A. Well, they come up to my squad. As I was pulling in they kept running towards me, and when I got there they stopped. I stopped and they were at my window.

Q. What if anything happened next?
A. Well, one of the two women related that there had been a stabbing inside.

Q. Did she use that word "stabbing"?
A. Yes.

Q. When she said that were you inside your car?
A. Yes, I was.

Q. You had your window down?
A. At the time I was talking to her I had it down.

Q. What did you do after she told you that?
A. I relayed to the base telecommunications, the dispatcher that gave me the call, that there had been a report of a stabbing.

Q. What's the next thing that happened?
A. She had asked me if she should dispatch an ambulance and [377] I had related to her that that would be a good idea.

Q. I'm sorry. What did the dispatch ask you?
A. The dispatcher asked me if she should call an ambulance.

Q. What did you say in response?
A. And I said, "Yes that would be a good idea."

Q. Now when that interchange took place were you still inside of the squad car?
A. Yes, I was.

Q. And did you notice where the two black women you had seen a short while ago were?
A. They were still right at my car door.

Q. What is the next thing that you did?
A. I exited the vehicle then. And I started to walk up towards the apartment building 957.

Q. As you did that you have anything in either of your hands?
A. No.

Q. Did you have your weapon out?
A. No.

Q. At anytime as you were walking toward the building did you take your weapon out of our holster?
A. As I was walking toward the building, no.

Q. Did you eventually take your weapon out of your holster?
A. Yes.

Q. Where were you when you did that? [378]
A. At that point I had moved on to the grass.

Q. Where were the two black women who you had seen a short while earlier at this point in time?
A. As I started walking up to the building they were behind me, and then I moved onto the grass and those two women were still to — it would have been my left, slightly behind me.

Q. Were there any other police officers present at the scene at this particular moment?
A. No.

Q. Were you looking toward the building?
A. Yes.

THE COURT: Mr. Rogus, may we avoid leading the witness?

MR. ROGUS: Yes, sir.

BY MR. ROGUS:

Q. What if anything did you see next?

A. As I was walking up towards the building and I was still on the sidewalk I saw approximately five subjects, five male subjects exhibit the building in a hurry. They ran outside the building, Turned westward which would have been to their left, and just on the grassy area they stopped. One of the subjects had a pipe in his hands.

Q. Which hand.

A. Which hand I don't know. I can't recall which hand he had that in. [379]

Q. Did you observe anything further about those particular subjects?

A. Yes. As they started to move on the grass is what made me move towards the grass and of the sidewalk. They were all milling amongst themselves, they were screaming, and yelling. The subject with the pipe had the pipe raised above his head and he was waving it.

Q. What is the next thing that you observed happen?

A. The crowd, the group of men that exhibited the building were all — well, they were yelling and screaming and was waving the pipe. And I had ordered him to drop the pipe several times, and he did not drop the pipe. I had ordered everybody to get on the ground, and he did not — nobody was listening, nobody was on the ground.

Q. At this point did you have your weapon out?

A. After he did not drop the pipe and I yelled several times to drop the pipe, then I drew my service weapon.

Q. And what did you do with it when you drew it?

A. I just drew it and I just held it down.

Q. Can you stand up and demonstrate for the ladies and gentlemen of the jury how you were holding your weapon just after you drew it?

A. Okay. I have to move to the side.

MR. ROGUS: Your Honor, if the witness may step down.

THE COURT: She may step down. [380]

A. I am right-handed, so I would have drawn the weapon out and just brought it down.

Q. So you had both lands on it?

A. Yes.

Q. Okay. And if the record would reflect — would you please do that again?

A. (Indicating).

Q. That the witness has her hands together, her arms straight forward in front of her pointing at an angle downward toward the ground.

THE COURT: Her hands at about waist level.

MR. ROGUS: Thank you. Would you resume the stand?

BY MR. ROGUS:

Q. How long did you remain in that position?

A. Immediately after the first group of subjects came out of the building, they were still in the area just onto the grass. Immediately after that I saw two other subjects exit the building.

Q. Let's talk about the first subject?

A. Okay.

Q. Can you describe that subject?

A. He was a male white subject, taller, thin build maybe about 6 feet tall, six feet one, brownish or sandy-colored hair and.

Q. What. I am sorry. Were you finished? [381]

A. He was thin.

Q. What if anything did you observe that subject do?

A. He was running.

Q. From where?

A. He exited 957, the apartment building, it's hallway that you can come out of, he exited that, and he turned to what would be his left again heading westward through the grass.

Q. As he did that what if anything else did you observe?

A. I observed another man a male black subject with a butcher knife directly behind him.

Q. Where was that male black subject when you first saw him?

A. He was coming out of 957 Grand Canyon. I saw them both exiting the door.

Q. How far behind the first subject was the second subject?

A. A couple of feet. He was directly behind him.

Q. What is the next thing that you observed?

A. The male white subject ran either through the crowd of the first group of subjects that were just — they were still milling around on the grass area. As they exited the door there are some bushes and they turned towards what would be the west.

And they were still there was a lot of commotion, and they were still yelling. He either ran through them or just between them and the bushes.

Q. What did the second subjects, do if anything?

A. He followed him the entire time. He kept — be followed [382] in his direction.

Q. What is the next thing that happened?

A. I ordered the male black subject with the knife to drop the knife several times. I told him to drop the knife and get on the ground.

Q. How did you order him?

A. I was yelling at him to drop the knife and get on the ground.

Q. What is the next thing that happened?

A. Well, he did not drop the knife, and he did not get on the ground. He actually had gained on the first subject, the male white subject who exited the door first. The distance between them was decreasing. He was directly behind the first subject.

Q. When the second subject had made it to the lawn area —

A. Right. They had passed through the crowd, and there was like a little clearing on the lawn.

Q. Did you observe whether he was holding anything at that time?

A. The second subject, the male black subject.

Q. Yes.

A. He was holding a butcher knife.

Q. How was he holding it?

A. He was holding it in his right hand like this (indicating) out as he was running the entire time from when he [383] exited the door and then he kept chasing him and he gained on the first subject.

Q. For the record, you just made a gesture with your arm. Would you show the jury again the gesture?

A. He was returning like this with the knife, the blade pointed outward.

Q. Now you have your elbow bent?

A. Yes, it was bent.

Q. And then the lower part of your arm, from your elbow to wrist, you have pointing straight upward?

A. That's right? He was running like this (indicating).

Q. And which direction was the blade of the knife facing?

A. It was pointing outward, which would be west, which is the same direction they were running, which was right behind the first subject that had exited the building in front of him.

Q. What is the next thing that happened?

A. I kept ordering for him to drop the knife and he did not drop the knife.

THE COURT: About how many times did you do that?

THE WITNESS: Several times. As he was gaining speed on the first subject until they were directly — he was directly in front of him, like the first subject's back, and then the second subject, as he was gaining on him the second subject, the male black subject with the knife took the knife back, raised it above his head and I waited, and as he started to come down with [384] the knife and made the downward motion, I fired one shot at him.

BY MR. ROGUS:

Q. Will you describe the motion that you went through in firing the shot?

A. As they were coming out the building I had already moved onto the grass. And as they were running I was following their pattern, and I was keeping my eyes on the male black subject with the knife and how I observed how he was gaining on the other subject. I did not even have time to square up.

Q. What do you mean when you say "square up"?

A. Like in a proper stance that you would have — I didn't have time to square my body up to the subject.

MR. ROGUS: Your Honor, if I may ask the witness to step down just momentarily to demonstrate what she is referring to?

THE COURT: You may do that.

MR. ROGUS: Ms. Redmond, will you step down for a moment, and show the ladies and gentlemen of the jury what you mean when you say "square up"?

A. Okay. Say if I were standing here and the door would be approximately over by the table, as he exited the door, he started running towards west, this would be the west. I was standing here, and as they were running I didn't have time to take the steps to support my body, so my hands — I had to come up as I followed their motions, so my arms came up as I followed [385] their motions.

Q. What's a square-up stance? Show what you mean by square-up stance?

A. Technically, I mean the ideal situation when I am shooting at an angle I am going to shoot straight on.

Q. So in other words a square-up stance?

A. Well, it's like that (indicating).

Q. You would have your arms straight in front of you?

A. Yes. Ideally you want to — or a lever stance, which would be like that (indicating), but I never shot like that.

Q. Okay. When you would you "square up" your method of doing would be to have your feet parallel?

A. Right.

Q. But you had indicated that there is another possible way to do it?

A. Yes.

Q. And that involves doing what?

A. It would be the lever stance, which would be like to side, but as I qualified and I was training I trained this way. I felt more comfortable this way (indicating).

Q. On the day in question did you ever assume that position?

A. No. No. I had — there wasn't time to do that.

Q. What motions did you go through then in bringing the gun from the position you had it pointed where your wrists were about waist left to the position you were holding it when you [386] fired the shot?

A. When I fired I had to fire at an angle because the knife was coming down, I had to bring gun up like so (indicating). So I am actually fired at a slight angle.

Q. Okay. Resume the stand, please.

Once the second subject got pass that — strike that. Did he get pass that crowd of five people that you had seen?

A. Yes, they both did.

Q. Once he got pass that crowd of people how much time elapsed before you fired the shot?

A. A few seconds. Three or four seconds.

Q. Could you tell how close you were standing to that subject at the moment you fired the shot?

A. It was approximately ten feet.

Q. When you fired the shot —

THE COURT: Pardon me for interrupting. Were they both running all this time?

THE WITNESS: Yes, they were, your Honor.

THE COURT: Go ahead.

BY MR. ROGUS:

Q. When you fired the shot what did you observe about the second subject, the black with the knife in his hands?

A. Okay. As I fired a shot at the point of impact his entire upper body, he jerked back, he spun 180 degrees and fell to the ground. So he actually his head was then pointing in a [387] westward direction and his feet were pointing eastward. So he kind of spun and appeared to be in the opposite direction.

Q. How did he land?

A. He landed flat on his back.

Q. Did you see what happened to the knife?

A. Yes.

Q. What happened to the knife?

A. After I had fired the shot I ran up towards him, and the knife was laying on the ground.

Q. Where in relation to his body?

A. It was on his right-hand side, I would say approximately between his shoulder like in his knee area.

Q. And could you estimate the distance that the knife was lying from the body?

A. Maybe a few feet, two or three feet.

Q. What did you do then at this point where you had arrived at the position you just mentioned?

A. Okay. Well after I fired the shot the first subject he had dove to the ground, so he was a little bit in front of the other subject. And I was standing then in between the two subjects and kind of on an angle so most of my back was towards the building. I was on an angle, I wasn't completely back towards the building but on an angle where a good portion of my back was, because I had to keep watching the rest of the crowd, what was going on. [388]

Q. Where was the rest of the crowd at this point?

A. Well, the fire subjects that originally came out of the building first they were still there. The two women were still there. But after the shot was fired people came pouring out of the buildings and people were coming from everywhere, so I can't tell

you.

Q. What did you do when you saw that going on?

A. Well, the first subject, the male white subject, I interpreted he was trying to get up.

THE COURT: No, the question is what you did.

BY MR. ROGUS:

Q. What did you do?

A. I though this was —

Q. Well, I want to know what you did?

A. Okay. Well, I stood there and I was calling for more backup to get the ambulance there.

Q. How were you doing that?

A. My portable radio.

Q. And where was your portable radio?

A. It's on a belt and then there is receiver that is clipped actually to your shirt.

Q. So how would you utilize that then?

A. Just press it and talk into it.

Q. Before you did that did any other officers appear at the scene? [389]

A. No.

Q. How long was it after you used the radio before you noticed another officer on the scene?

A. I would say about a minute, minute and a half approximately.

Q. Now during that minute, minute and a half, did you have an opportunity to observe where the first subject was located?

A. Yes, I did.

Q. And where was he in relation to where you were standing?

A. He would have been a little bit behind me on an angle. Since my body was turned I was trying to be able to watch what was going on. He was in front the male black subject that was on the ground. In front meaning he was further west and he was a

MR. FUTTERMAN: And PX 7 is a handwritten draft of a report. Look at this report, Ms. Redmond. And do you see in this report where it says, "Several male black subjects ran out of building," do you see that? [412]

A. Yes. Move your finger so I can read it.

Yes, that's what I wrote.

Q. And then I show you for reference Plaintiffs' Exhibit 8.

THE COURT: 8.

BY MR. FUTTERMAN:

Q. Is that the redraft of the report?

A. Can I look at this to make sure it's the right one?

THE COURT: You will have to keep your voice so that the jury —

THE WITNESS: I want to look — there are several reports here and I want to make sure.

THE COURT: You may do that. Just as a matter of making sure that whatever you say is on the record.

THE WITNESS: Okay. Yes, "Several male black subjects."

BY MR. FUTTERMAN:

Q. You had it two times, didn't you?

A. Yes.

Q. So, is it correct then that there were only three blacks who came out of the building?

A. I believe I said to the Syre interview that there were approximately five male subjects at the time — five or three, there was a group of male subjects that exited the building turned to the left leave and were on the grassy area.

Q. So you don't know whether it was three or five? [413]

A. It could — perhaps it was 3, 4 or 5. There was a group of subject exiting the building.

Q. What were these subjects doing?

A. They ran out of the building, they turned to the left and in the grass just outside the doorway. One person had a pipe in their hand, and he was waving the pipe above his head, and I didn't not at that point if that was the fight in progress that I was being called to.

Q. Let me ask you a question. When you say five — "3, 4, 5 came out of the building," did they all come out at once? 3, 4 or 5 come through the doorway at once?

A. One right after the other. A whole crowd came out.

Q. So when the first one came out did that first one stop so the second one could catch up, and then the third one, then the fourth and then the fifth one?

A. There was a group that ran out of the building that turned slightly into the grass, they stopped and milling amongst themselves. One had a pipe above their head, they were screaming and they were yelling.

Q. They came out one at a time. My question for you is did the first one come out and stop, and the second one come out and catch up with the first, and then the third one come on and catch up with the first two?

A. What you are describing is to me I take it as an orderly fashion, and that is not how it was. They ran out of building. [414]

Q. One at a time?

A. I couldn't tell you if it was one at a time or two trying to squeeze through the door at the same time. I mean it's just a doorway, exiting the building. They just ran out.

Q. Then they stopped running as soon as they ran out of the building?

A. They ran out of the building, they turned west.

Q. And stopped?

A. They were milling amongst themselves.

Q. Well, they stopped running at some point?

A. They stopped running but they did not stop moving. They were moving amongst themselves in the same area, yelling. The man with the pipe still had it waving it about his head, and they were all screaming.

Q. So he never dropped it, is that your testimony?

A. I never saw him drop it.

Q. Oh, he have dropped it and you don't know about it?

A. When I saw the subjects run out of the building with the knife that's what I focused on the pipe at that point.

Q. Now you say that the male — the white male came out of the building, was he running?

A. Yes, he was.

Q. Did he have anything in his hands?

A. Not that I saw.

Q. You saw nothing in his hands? [415]

A. No.

Q. Did you have a clear view of him as he came out of building?

A. Yes, I did.

Q. And you saw nothing in his hands?

A. No.

Q. And then did he turn to the left as he came out of building?

A. Yes, he did.

Q. Did he run through the crowd of five or three or four or however many blacks there were?

A. He ran through it or he ran between the crowd, and there is some bushes that are before the building. He either ran — the crows was milling around. And I can tell if he ran straight through the crowd or could have ran just directly behind the crowd — between the crowd and the bushes.

Q. When he ran through the crowd or straight behind the crowd you couldn't see him for a moment, could you?

A. I could see him. I couldn't see his entire body. I could see him.

Q. You couldn't see his hands? You couldn't see his arms? You couldn't see the hands or the arms of the crowd of blacks, is that right?

A. When I saw the knife I could see the body of the white subject exit the building. He was going either through the [416] crowd or behind the crowd. I don't know if he ran directly through the middle of them, or just right behind them. I mean where they were standing, where the bushes were, we are talking just a matter of feet.

Q. When he ran through the crowd, Ms. Redmond —

THE COURT: Or behind the crowd.

Q. Or behind the crowd, was he slowed up in any way by the crowd of blacks?

A. It appeared to me as if he was trying to run as fast as he could.

Q. Well, the question is was he slowed up in any way? He didn't get slowed up, did he?

A. I don't recall.

Q. Now you say then the black subject came out right behind him, is that correct?

A. Correct.

Q. Did anybody come out between the two of them?

A. No.

Q. Are you sure about that?

A. Yes.

Q. Did anybody come out right behind the black subject who you claim was carrying the knife?

A. When I saw the black man come out with the knife raised up chasing somebody else, my vision was directed towards that scene. [417]

Q. Your Honor, I move to strike the witness' answer as being nonresponsive to the question.

THE COURT: Do you want to read the question back, Jesse?

(Record read)

THE COURT: Ms. Redmond, I understand your answer to be that you didn't see anyone and you have explained that as the reason for that?

THE WITNESS: Yes.

THE COURT: I will overrule the motion to strike.

BY MR. FUTTERMAN:

Q. How far behind the white subject was the black subject when you first saw them come out of the building?
A. A few feet.

Q. Two?
A. Two or three feet.

Q. Two or three feet?
A. Yes.

Q. And from the time they came out of the building until the time they got over by the black crowd, did that gap narrow?
A. He was — the second subject, the male black subject with the knife was gaining on the first subject.

Q. So by the time they got to the crowd he was right on top of him?
A. They had gone either through the crowd or directly behind [418] the crowd. Once they cleared the crowd he had gained on him to where he was directly behind him.

Q. So he wasn't directly behind him when he came out of the door?
A. He was two or three feet behind him.

Q. So by the time they got pass the crowd of blacks that were standing there he was one foot behind him?
A. One to two feet. He was directly — he was directly he behind him, yes?

Q. So were able to perceive that this black subject with the knife you claim you saw had gained one foot from the time he came out of the building until the time they passed through the crowd?
A. When they exited the building there was either two or three feet from the one — the one that first exited the building they were behind the crowd that was milling around.

THE COURT: Ms. Redmond, you have already testified to that. If you address, please, the question that counsel put to you.

THE WITNESS: Your Honor, I am sorry.

THE COURT: You were saying — were you able to perceive that there had been a gain of about one foot in that time span?

THE WITNESS: Yes. He was directly behind him. Yes, he did gain on him between the time span.

[419] BY MR. FUTTERMAN:

Q. So by the time they came through the crowd they were one foot apart, is that what your testimony is?
A. When they hit the clearing they were one or two feet apart. They were right there.

Q. Well, was the male white running in a straight line or was he running on an angle toward the street?
A. Exit the building turn west.

Q. That's left?
A. That's left. The building is on a slight angle. He didn't run directly parallel to the building, but he was not running towards the street. He was running out into the grass in an open area.

Q. So he was running away from the building, is that what your testimony is?
A. No, he wasn't running away from the building, but he was not running parallel to the building.

Q. Was he running toward the building?
A. No.

Q. If he wasn't running toward the building and wasn't running parallel to the building, and he wasn't running away from the building, where was he running?
A. He was running on an angle, that's a westward angle.

Q. Away from the building or toward the building?
A. It was away from the building but not away from building [420] toward the parking lot. It was away from the building to the grassy area.

Q. And where was the male black whom you claim you saw with the knife, where was he running?
A. The same direction. He followed him in the same direction.

Q. And this male black you claim had a butcher knife, is that correct?
A. That is correct.

Q. Now, when the male black came out of the building did he have the butcher knife in the up-raised position?
A. He had it in his right hand and was holding it like so (indicating).

THE COURT: The same position you previously indicated from the beginning?

THE WITNESS: Yes, from the beginning. He came out the door like this (indicating) holding it like this (indicating).

BY MR. FUTTERMAN:

Q. Was the door when he came out?
A. I don't know. When I first saw them come out the door — the door didn't open and then I saw somebody. I just saw them running out.

Q. So they both came through the open door at the same time?
A. One right after the other. [421]

Q. Did the door close before the second person came out?
A. No.

Q. Did it begin to shut?
A. No. Once I saw the second subjects, the male black with the knife, I have followed —

Q. Your Honor, excuse me. I move to after the "no."

THE COURT: I will strike that. That's granted.

BY MR. FUTTERMAN:

Q. Now you claim that the male black subject raised his butcher knife you claim he had up over his head at the instance

before you shot him, is that correct?
A. As he — as the distance between the two decreased and he was directly behind he, he raised the knife back up towards the back of his head, and I waited until he started to bring the knife down. Once I saw the downward motion I fired one shot.

Q. I am not sure I understand what you said. Did you just tell us a while ago that as soon as the male white and male black emerged from either within the crowd or between the crowd and the bushes, that the gap between them was one foot?
A. When they came out —

Q. Is that what your testimony is? When they got through that crowd or either between the crowd and the building as they passed in the clearing there was only a one-foot separation.

MR. ROGUS: Your Honor, I object to the question.

THE COURT: One or two feet. [422]

MR. ROGUS: Thank you.

THE COURT: That was your testimony?

THE WITNESS: Yes. One to two feet.

BY MR. FUTTERMAN:

Q. Was he still gaining on him?
A. Yes, he was gaining on him.

Q. Was he running up his back?
A. Well, he was that close, yes.

Q. Was he touching him with his legs?
A. They were directly behind each other.

Q. Ms. Redmond, they were running, weren't they?
A. Yes, they both were running.

Q. And were their arms swinging back and forth?
A. The male black subject arm was up in the air like this (indicating) while he running, and he was gaining —

Q. Where was his —

A. — on the other subject.

Q. Where was his left arm?
A. I wasn't paying attention to the left arm.

Q. Where were the arms of the white male? Did you see what they were doing?
A. I don't recall where his arms were.

Q. You said at some point the two females who had approached you when you first entered the parking area joined the crowd of blacks that were milling about in the front of the building, is [423] that correct?
A. Yes.

Q. Did you see them do that?
A. After I fired the shot and ran up towards the body then the crowd have kind of were milling amongst themselves.

Q. My question though is before you fired the shot did you see the two females join the other black males who were milling about in front of the building?
A. I misunderstood your question. Then no.

Q. You didn't see that?
A. No, I did not see that.

Q. And what you yelled when you saw the man who you claim was holding a knife was, "Drop the knife," is that what you said?
A. "Drop the knife and get on the ground."

Q. And that's all you yelled?
A. Yes.

Q. How many times?
A. Several times.

Q. Was it two, three, four?
A. At least three times. I just kept yelling the minute I saw him.

Q. And that's all you yelled?
A. "Drop the knife, get on the ground."

THE COURT: How far apart were those things that you [424] yelled?

THE WITNESS: One right after another. I just keep repeating it. I didn't stop, just kept yelling, "Drop knife and get on the ground, drop the knife get on the ground," just like that.

THE COURT: And you said that you did that at least three times?

THE WITNESS: Yes.

BY MR. FUTTERMAN:

Q. How long did it take you to get from the car to the grassy area where you pulled your gun?
A. A second or two. I mean it's not a very long sidewalk.

Q. How long was it before you reached that point that you saw the five or three or four blacks come out of the building?
A. As I started to walk up the sidewalk it was just a couple of seconds after I got out of the car they came out of the building.

Q. Were you standing in position when they come out of the building?
A. What position?

Q. On the grass?
A. No. I was walking up the sidewalk as they were — they ran out of the building.

Q. you said you yelled something at them when they come out of the building, is that correct? [425]
A. Right. As they moved onto the grass I told the subject with the pipe to drop the pipe, and then I started yelling to get on the ground.

Q. How many times did you yell that?
A. A couple of times. I kept yelling to drop the pipe and get on the ground.

Q. Nobody was paying any attention to you, is that correct?
A. Nobody was paying attention.

Q. Perhaps because they couldn't hear you?

A. No.

Q. Do you know whether they heard you?
A. A reasonable person should have been able to hear me.

Q. Do you know whether they heard you?
A. I can't say if one person can hear another person at any time.

Q. You said you didn't have time to square up —
A. Uh-huh.

Q. — when you shot. After you shot were squared up?
A. No. After I shot I started to run up towards the body.

Q. With your gun drawn?
A. I was running my gun was at my side.

Q. Your gun was where, I am sorry?
A. I was running up towards the body. My gun was still out.

Q. Did you point the gun at anybody after you shot Ricky Allen? [426]
A. Yes, I did.

Q. How many people did you point the gun at?
A. In the crowd several people on different occasions started to charge at me, and they were yelling and the crowd is quite hysterical. When he got to a certain point that I felt my safety was in jeopardy, my gun came up, and I kept telling them to get back, get down, get beyond the sidewalk, get on the ground. And when they came within a point where it was in my safety zone, yes, the gun came out.

Q. How close did they get to you before your gun came up?
A. It would be right before arm's length.

Q. So you just held your arms out in front of you hands clasped together, you had your gun, and there was somebody that close to you coming at you, is that your testimony?
A. Yes. I had somebody charging at me, not very happy, and they are screaming hysterically.

THE COURT: Limit yourself, if you will, to responding to the question, please. The question was what was the distance.

THE WITNESS: The distance?

THE COURT: Yes. Was the person on people that you are referring to almost at arm's length from you — that is just beyond arms's length?

THE WITNESS: Just beyond arm's length. If my arms were out, their arms were out, they could reach and be able to [427] touch me, the gun would have been up.

BY MR. FUTTERMAN:

Q. Now didn't one or two people in the crowd attempt to go to Ricky Allen's body?
A. No.

Q. Nobody did that?
A. Not that I recall.

Q. Not that you recall.
A. I didn't see that.

Q. You didn't see that. You were standing right by Ricky Allen's body, weren't you?
A. Yes, I was.

Q. Didn't somebody try to come to his aid and tell you that she was a nurse's assistant?
A. No.

Q. That never happened?
A. That never happened.

Q. Nobody else tried to go to Ricky Allen's aid, is that correct?
A. No. When Officer Graham arrived, he walked towards the body.

Q. Before Officer Graham arrived, did anybody try to go to Ricky Allen's aid?
A. No.

Q. You didn't say to a black female who tried to go to Ricky [428]
Allen's aid, "Get back or I'll blow your head off"?
A. No.

Q. Did you say that at all that day?
A. No.

Q. You remember that you didn't say it?
A. Yes.

Q. That's something you do recall?
A. I never said that.

Q. When you saw the two subjects running through the grass how far away from you were they?
A. As they exited the building and ran out side on an angle, so in the beginning I would say about 15 feet. Then as they ran on the angle, it would have been closer, about 10 feet at the point of where I initially fired the shot.

Q. When you say "angel" you mean they were both running on an angle away from the building?
A. They were on a slight angle. Well, first of all, the building is on a slight angle. They were running out into the grass. They didn't exit the building and abruptly make a right-angle turn and run directly along the building.

Q. Did the white male who came out of the building stumble and fall down on his back just after he came out?
A. No.

Q. He didn't fall and stumble about 6 or 8 feet from the sidewalk and wind up on his back? [429]
A. No. When I fired the shot he dove to the ground and he was on his stomach.

Q. Your Honor, I move to strike everything after "No."

THE COURT: Yes, I will sustain a motion to strike.
And please, Ms. Redmond, limit yourself, if you will, to responding directly to the questions.

BY MR. FUTTERMAN;

Q. Now as I understand your testimony when you shot Ricky
Allen you saw him spin around, is that correct?
A. He spun 180 degrees, yes.

Q. And he wound up on his back?
A. Yes.

Q. And his head was pointing toward the entrance of 955, is that correct?
A. If that would be the next apartment west of 957, yes.

Q. As you face the building —
A. Uh-huh.

Q. — and look at the 957 entrance —
A. Yes.

Q. And the 955 entrance being the next entrance to the right as you are facing the building —
A. Uh-huh.

Q. — Ricky Allen's head was pointing towards that entrance, is that correct?
A. That is correct. [430]

Q. And his feet were pointing toward the 957 entrance, is that correct?
A. That's correct.

Q. And you claim that the knife was between Ricky Allen's right side as he lay on the ground and the building, is that correct?
A. That's correct.

Q. By the way, as a police officer are you trained to have good powers of observation?
A. Well, I think that would be a qualification for the position.

Q. As a matter of fact from time to time you served as an evidence technician for the Hoffman Estates Police Department, didn't you?
A. Yes.

Q. And that involves going to the scene of a crime or an incident and retrieving information and retrieving items that may be at the scene, isn't that correct?
A. That's correct.

Q. And you have to very carefully note what objects are when you retrieve them, don't you?
A. Yes.

Q. And you have to know the difference between left and right, don't you?
A. Yes. [431]

Q. And you would expect all police officers would know that difference, right? Is that correct?
A. That's correct.

Q. And so if any police officer said the knife was to the left of Ricky Allen's body either that officer would be incorrect or you would be incorrect, you agree?
A. The knife was to the right of Ricky Allen's body.

Q. Did any officers to your knowledge write any reports saying the knife was to the left of the body?
A. Not to my knowledge.

Q. Did anybody to your knowledge — have you ever heard that somebody claims the knife was under Ricky Allen's body?
A. Not to my knowledge.

Q. Would you agree that the knife couldn't be to the left and to the right and underneath Ricky Allen's body?
A. Yes. It couldn't have been in all three locations.

Q. Right after the shooting would it be fair to say that you were bewildered?
A. No.

Q. That is not an accurate characterization?
A. No.

Q. You had your full faculties about you right after the shooting?

A. Yes.

Q. Would you say that anybody who claims you were bewildered [432] was not telling the truth?
A. Yes.

Q. Is it correct, Ms. Redmond, that you never saw a knife in Ricky Allen's hand?

MR. ROGUS: Object to that question.

THE WITNESS: No, that's not correct.

MR. ROGUS: Your Honor —

THE COURT: Counsel, let's confer at side-bar.

(Whereupon the following proceedings were had at side-bar out of the hearing of the jury:)

THE COURT: I guess that's a classic cross-examination question, you know. I recognize, indeed, on direct — toward the end of direct examination — if you recall you asked several questions of a direct nature which were leading type but are always permitted when counsel is attempting to reinforce a witness' rejection of the position the other side is taking. So just as I certainly didn't interrupt, you know, your question along those lines, even though technically I think those were leading, they are always permitted, because they are always regular, and this is certainly permitted as part of cross-examination.

My reason for asking for the side-bar is that I didn't want to have a similar objection in a position to other question that effectively say "Isn't this so," you know, "Isn't that so," to which the witness will undoubtedly give the denial. Okay. [433]

MR. ROGUS: Thank you.

(Whereupon the following proceedings were had in open court in the presence and hearing of the jury:)

THE COURT: That objection is overruled. Do you want to restate the question?

BY MR. FUTTERMAN:

Q. Ricky Allen did not have a knife in his hand on June 27, 1991 when you saw him, isn't that correct?

A. That is not correct.

Q. There was no knife near his body after you shot him isn't that correct?

A. That is not correct.

Q. The white subject that you claim you saw being chased by Ricky Allen, he wasn't in any danger on June 27, 1991 when you shot Ricky Allen, isn't that correct?

A. That is not correct.

Q. By the way, was Ricky Allen on his stomach at anytime while you were there?

A. On his stomach?

Q. Yes.

A. No.

Q. Weren't you told, Ms. Redmond, by officers of the Hoffman Estates Police Department that they were going to protect you in this case?

A. No. [434]

Q. You were never told that?

A. I was never told that.

Q. You know, don't you, that if Ricky Allen didn't have a knife your shooting of him was not justified under Hoffman Estates Police Department deadly force policy, is that correct?

A. If Ricky Allen didn't have a knife I wouldn't have shot him.

THE COURT: That is not the question, Ms. Redmond, and the jury will disregard that.

Do you want to read the question back to the witness, please?

(Record read)

THE WITNESS: Yes.

MR. FUTTERMAN: No further questions, your Honor.

MR. ROGUS: Your Honor, if I may just have a brief moment?

THE COURT: Surely.

REDIRECT EXAMINATION:

BY MR. ROGUS:

Q. Mary Lu, what is your understanding of the meaning of the word bewildered?

A. Dazed, not knowing what's going on. Out of control.

Q. Okay. Thank you.

No further questions, your Honor.

THE COURT: Anything else? [435]

RECROSS-EXAMINATION:

BY MR. FUTTERMAN:

Q. Yes, your Honor.

And after you shot Ricky Allen, weren't you dazed and not knowing what was going on?

A. No, that's not true.

MR. FUTTERMAN: No more questions.

THE COURT: Thank you.

Anything further, Mr. Rogus?

MR. ROGUS: No, your Honor.

THE COURT: You are excused.

(Witness excused)

* * *

[675]

MR. FUTTERMAN: Thank you, your Honor.

CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF:

* * *

[677]

You will recall that one of the questions that we asked Mary Lu Redmond, when she was on the stand was, "Were you having any personal problems on the day of the shooting?" And [678] you remember what her answer was? She didn't say, "I can't recall," to that one. She said, "No."

And then we asked her, "Did you ever tell anybody that you were having personal problems on the day of the shooting?" And once again she remembered her answer to that one. She didn't say, "I can't recall," she said, "No."

Not an hour later Karen Beyer took the stand and proved that Mary Lu Redmond had lied about that point, because Karen Beyer said that Mary Lu Redmond told her that she was having personal problems on the day of the shooting. We don't know what those personal problems are. We can't even begin to imagine: Was it a termination of a relationship with a loved one? Was -- had something happened to her that caused her to be upset? We don't know. But we do know this: As you hear this story unfold again you will find that Mary Lu Redmond did not act responsibly that day.

* * *

[685]

We asked Officer Redmond about her conversations, you will recall, with the Village employee, Karen Beyer. She said she had maybe 50 to 75 conversations with Karen Beyer. And she said that the reason that she was having these conversations with Karen Beyer was because of the shooting. So you would think that she'd be able to remember some facts that she relayed to Karen Beyer about the shooting.

You will remember that long series of questions that I went through with her about various facts pertaining to the shooting. Who came out? What were they doing when they came out? What was Ricky doing when he come out? What was TJ doing? What were the people on the scene doing? What did you talk to Karen Beyer about with respect to the knife? Pulling the trigger?

Whether you had any loss of memory? Every one of those questions, she said, "I can't recall." And remember it [686] was made clear to her by the Judge that she wasn't being asked to recall specific conversations like, "What did you say to her on December 12th, 1991?" She was being asked about subject matters. What did you say to Karen Beyer about subject matter one -- for example, the knife? What did you say to Karen Beyer about Ricky Allen running out the door? She could not recall anything. Now I ask you, can you believe that?

I mentioned a moment ago that Karen Beyer had indicated that she made notes of the conversations that she had with Mary Lu Redmond. Remember Officer Redmond knew that Karen Beyer was making notes. And she said here in the courtroom for you all to hear that she didn't want Karen Beyer to provide those notes to us. She also said here in the courtroom that she wouldn't authorize Karen Beyer, if her authority was needed, to turn those notes over. And she said that even though the Court had ordered previously in the case that those notes be turned over. But you know what was real interesting about her testimony with respect to Karen Beyer? She could remember the date she started talking to her. And she could remember the date when she stopped talking to her. Nothing in between.

What did Karen Beyer say? You remember Karen Beyer. She came in right after Mary Lu Redmond in our case. She confirmed that she made notes. She admitted that she wrote down things that Redmond said. She was forced to admit here in the courtroom that those notes were the property of the defendant [687] Hoffman Estates. That if she stopped working there, she would have to leave the notes there. She admitted giving us three pages of crossed-out notes. A couple of phrases on them, we couldn't read what she had crossed out. And remember what she said about those notes, and Redmond's ability to recall. She said those notes would help Karen Redmond recall what Karen Redmond said -- what Mary Lu Redmond said to Karen Beyer. Excuse me.

Now you are going to get an instruction when the Judge instructs you on the law in this case. And the Judge is going to tell you that those notes were Village property and that he ordered the Village of Hoffman Estates to turn those notes over to us, that the Village refused. That the Village had numerous chances to turn those notes over to us. That Redmond refused to turn those notes over to us. The Judge will tell you that there is no legal justification for that refusal. And he will tell you that under these circumstances that you are entitled to presume that the contents of those notes would be unfavorable to Mary Lu Redmond and to the Village of Hoffman Estates.

Now let's turn to Mary Lu Redmond's testimony when she was called as a witness for the defense. Do you remember what she said about her memory? She said, "It's better today than it was two and a half years ago." Totally unbelievable. We mentioned the gratuitous comments she made before about the housecoats, and we showed you how that was a lie. We showed you [688] during her examination, when she was testifying for the defense, how she was so certain that when she got out of the car she was walking with her gun pointed down -- like this (indicating), instead of like this (indicating).

Then we asked her, "Don't you remember you had an interview a few hours after the incident?" And she acknowledged that she had that interview by another police officer. And we said to her, "Didn't you tell the interviewer that you couldn't recall how you were holding your gun?"

Of course, her answer to that was, "I don't recall." And then we showed her the statement that she gave to that police officer, and showed her where she had said to him, on the day of the incident, just a few hours after it happened, she couldn't remember how she was holding her gun.

* * *

[700]

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT:

MR. ROGUS: May it please the Court, counsel, ladies and gentlemen. * * *

[724]

What was it that counsel was asking her about that she could not recall? It wasn't the occurrence. It was not the facts of the occurrence. It was what she talked about the occurrence with another individual, Karen Beyer. I respectfully submit to you, there is a world of difference between not being able to remember the event itself and not being able to remember what you might have said to another person over the course of 50 to 75 meetings that took place over a 6 month period. You're talking apples and oranges here. You're talking apples and [724] watermelons. They are two entirely different things. And yet that's the whole basis of this full frontal assault on the credibility of Mary Lu Redmond. That she couldn't remember what she discussed with Karen Beyer.

A very interesting thing happened in this trial and I hope you caught it, ladies and gentlemen. You see counsel did throw a lot of questions at Mary Lu Redmond about what she's claiming she can't recall telling Karen Beyer. And Mary Lu came right and told you: I don't recall. I don't recall. And, of course, the other side wants you to start thinking, "Well, gee, she can't recall. She's not worthy of belief."

Then what do they do to follow up this assault on credibility of this police officer who had just made this very difficult decision? Well, then they bring Karen Beyer in and they put her on the stand. They ask her some questions about those conversations, too. I hope you recall that testimony. If not, perhaps I can refresh your recollection. Beyer is asked also a whole bunch of questions. The same kinds of questions about same kinds of subject material or subject matter that counsel questioned Mary Lu Redmond about.

Question to Karen Beyer -- by the way this is page 35, December 15, 9:30 a.m., line 10.

"Did she ever tell you I can't recall how I got there?"

Karen Beyer's answer: No. [725]

Next question: Did she ever tell you I can't recall what the people were doing when I got there?

Karen Beyer's answer: No.

Nest question: Did she ever tell you that she can't recall how far the two men were away from each other when she shot and killed Ricky Allen?

The answer: We never talked about that specific thing."

There's more. Page 45.

"Question: I'm sorry when you spoke with Mary Lu Redmond those 50 times, did she ever tell you she couldn't recall how she drew her gun?

Answer: I don't remember her specifically saying that.

This is Karen Beyer not remembering. This is not Mary Lu Redmond. This is Karen Beyer telling you this.

"Did she ever tell you that she couldn't recall the crowd of black people that came up to her?"

Answer: No.

"Did she ever tell you that she could not recall who she saw coming out of the apartment building?"

Answer: No.

"Did she ever tell you that she couldn't recall what she saw at the scene?"

Answer: No. [726] "Did she ever tell you that she couldn't recall what Ricky Allen was doing at the time she shoot him?"

Answer: No.

"Did she ever tell you that she couldn't recall anything about the incident?"

Answer: No."

Well, now ask yourself this: What's so incredible about Mary Lu Redmond not being able to recall things that she talked to Karen Beyer about, when Karen Beyer is telling you they didn't talk about it? Where is the impeachment?

MR. FUTTERMAN: Objection.

THE COURT: Mr. Rogus, that objection is sustained. That was not the testimony. The testimony was not they didn't talk about it in response to a question that says, "Did she ever tell you

this," and the answer is "No." It's not a fair characterization of the testimony. And the objection is sustained.

MR. ROGUS: Has Mary Lu's version about what happened been rebutted? * * *

[731]

THE COURT: Please be seated. Members of the jury, the conclusion of closing argument, rebuttal on behalf of plaintiffs will be by counsel Kenneth Flaxman. Mr. Flaxman.

MR. FLAXMAN: Thank you, your Honor.

* * *

[733]

Another thing that he knows, which he tried to slip past you and the judge stopped him, was that when Karen Beyer testified, she didn't say that Mary Lu Redmond had a memory problem when we talked. Karen Beyer said Mary Lu Redmond had no trouble at all remembering anything about the incident. She could remember the most minute details. What did Mary Lu Redmond say when she sat in this and she was asked questions about what happened? She was asked: Well, do you remember what you told Sgt. Sizer right after the incident about whether you had your hands up when you were getting out of the car? What did she say? She said: I don't recall. What did Mary Lu Redmond say when she was asked: When you saw that white man running, did he slow down as he ran through that crowd or around that crowd or underneath that crowd? What did she say? She said: I don't recall. What did Mary Lu Redmond say when she was asked: Did you talk to Officer Graham when he come on the scene? Now put yourself in her place. You've just killed somebody and you think there is a knife next to his body. What are you going to say? You are going to say: Watch out for that knife. Make sure that knife doesn't move. What did she tell us when she testified? "I don't recall what I told Graham."

The reason why she doesn't recall, the hard questions, is because she made up the story to help her live with this [734] horrible thing that she did back in 1991. When she killed an unarmed man when she shouldn't have. When she deprived Ricky and Brandon of their father. She's made up a story to let her sleep at night. But it's not a true story. It's not a story that's worthy of any believability at all. It's a story that you, the jury, should say: We don't believe that. This is a lie. Just like Mr. Rogus said when he told you his version of the incident, but omitted Mary Lu Redmond's recollection. Her story. Her incredible tale of those five men who are coming out of this door.

* * *

Supreme Court, U.S.
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No. 95-266

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr., Deceased,

Petitioner,

v.

MARYLU REDMOND, Hoffman Estates Police Officer,
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Do the Federal Rules of Civil Procedure provide a district judge with adequate tools to protect the privacy interests involved in confidential communications with a psychotherapist without the creation of a new evidentiary privilege under Rule 501 of the Federal Rules of Evidence?
2. Assuming that a privilege for psychotherapist-patient communications is required to protect confidential communications, should the privilege be extended to social workers, rather than being limited to psychiatrists and clinical psychologists, as contemplated in Proposed Rule of Evidence 504?

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No. 95-266

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

**CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr., Deceased,**

Petitioner,

v.

**MARYLU REDMOND, Hoffman Estates Police Officer,
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,**

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the Court of Appeals (Pet.App. 1-24) is reported at 51 F.3d 1346. The rulings of the district court (Pet.App. 27-34, 35-40, 41-50, 51-59, 60-64, 65-66) are unreported.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court was invoked under 28 U.S.C. §1254 in a petition filed on August 10, 1995. The Court granted the petition on October 16, 1995.

RULES INVOLVED

This case involves Rule 501 of the Federal Rules of Evidence:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state or political subdivision thereof shall be determined in accordance with state law.

STATEMENT

In 1991, petitioner filed a lawsuit under 42 U.S.C. §1983 seeking damages for the death of her son, Ricky Allen, who had been killed by respondent MaryLu Redmond, a police officer employed by respondent Hoffman Estates, Illinois.[1] (App. 8-12.)

Respondent Redmond shot Allen while responding to a "fight in progress" call at an apartment complex. (App. 123.)

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[1] Petitioner also asserted a wrongful death claim under Illinois law. (App. 9-11.) The minor children of Ricky Allen joined in the complaint to assert a Section 1983 claim for the loss of their father. (App. 11.) Plaintiffs voluntarily dismissed the children's claim before the case was submitted to the jury.

Redmond, who was the first officer to arrive at the incident, was met at her police car by Connie Allen and Sharon Allen, who told Redmond that there had been a stabbing inside one of the apartments. (App. 126.) According to Redmond, as she approached the entrance to the apartment building, she saw five men "exit the building in a hurry." (App. 128.) One of the men was waving a pipe over his head. (*Id.*) Redmond testified that she ordered the man to drop the pipe and instructed everyone to get on the ground, but none of the men heeded her commands. (*Id.*) Redmond testified that she then drew her service revolver (*id.*), and observed two men, one black, one white, running out of the building. (App. 129.) Redmond stated that the black man, Ricky Allen, was holding a butcher knife and chasing the white man, Thomas Jamell. (*Id.*) According to Redmond, she shot Allen as he was about to strike Jamell with a knife, after Allen had disregarded "at least three" verbal orders to drop the knife.[2] (App. 159.) A knife was recovered near Allen's body. (Testimony of Officer Graham, Tr. 440.)

Petitioner presented evidence at trial that Allen was unarmed,[3] that Redmond had emerged from her car with her gun drawn,[4] and that Redmond had panicked when she saw Allen walk out of the apartment building and shot him without any warning.[5] Petitioner secured an admission from the second officer on the scene that Redmond was "somewhat bewildered as far as what had just transpired." (Officer Graham, Tr. 445.) Petitioner also presented evidence that a police officer had planted the knife after the shooting.[6]

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[2] Jamell did not testify at trial, even though respondents' counsel had alluded to Jamell's expected testimony in his opening statement. (Tr. 21.)

[3] This testimony came from the siblings of Ricky Allen. (Connie Allen, Tr. 60; Robin Allen, Tr. 116, 118.)

[4] Sharon Allen, Tr. 255.

[5] Connie Allen, Tr. 54; Robin Allen, Tr. 118; Donald Jaffee, Tr. 179.

A paramedic who came on the scene shortly after the shooting, and who removed Allen's body from the scene, testified that he had not seen a knife. (Tr. 590.) The first police officer to arrive at the scene after the shooting stated on cross-examination that the knife was on Allen's left side (Officer Graham, Tr. 456); respondent Redmond testified that the knife was on Allen's right side. (App. 163.)

The jury returned a verdict in favor of petitioner, awarding forty five thousand dollars on the federal civil rights claim and five hundred thousand dollars on the state wrongful death claim. (Order, December 22, 1993.)

A. The Privilege Rulings

In the course of pre-trial discovery, respondent Redmond disclosed that immediately after the incident, she had discussed the shooting with Karen Beyer, a social worker employed by respondent Hoffman Estates, with whom Redmond was meeting several times a week for ninety minute sessions.[7] (App. 29.) When petitioner sought discovery from

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[6] This testimony came from siblings of Ricky Allen. (Robin Allen, Tr. 120; Donald Jaffee, Tr. 186; Sharon Allen, Tr. 267-68.) In addition, one of the first police personnel on the scene, a trainee, testified that he heard voices in the crowd yelling "They're moving the knife." (Tr. 234.)

[7] Beyer is a licensed clinical social worker and holds a Masters Degree in social work. (App. 18.) At the time of the incident, Ms. Beyer was the Director of Health and Human Services for respondent Hoffman Estates. (*Id.*)

the social worker, respondent Redmond asked the district court to preclude such discovery, asserting that the entirety of her conversations with the social worker were shielded by a psychotherapist-patient privilege. (App. 16-28.) Respondent supported her motion to quash with an affidavit from the social worker averring that all of her conversations with respondent "had pertained to my provision of counseling and counseling services." (App. 18.) The social worker's affidavit was silent as to any promise of confidentiality and did not contain any averment that disclosure of information revealed in the counseling sessions would harm respondent.[8]

On consideration of respondent Redmond's motion to quash, the district court held that the privilege issue was governed by federal, rather than state law.[9] (Pet.App. 27-29.) The district judge relied on Proposed Rule of Evidence 504,[10] and concluded that statements made to a social worker were not privileged. (Pet.App. 30.) The district court did, however, restrict to "counsel's eyes only" disclosure of information to be obtained from the social worker (Pet.App. 31) and limited disclosure to statements that respondent had made about the shooting.

In subsequent rulings,[11] the district judge stated that he was only authorizing inquiry into discussions with the social worker that were "fact-oriented — that is, having to do with [the] description of the episode, recollections of the episode." (Pet.App. 36.) The trial judge permitted a "narrow inquiry," (Pet.App. 47), under which petitioner could inquire about disclosures made "of the incidents of the day" of the shooting. (Pet.App. 48.) The court expressly prohibited inquiry about whether respondent had spoken about her dreams (Pet.App. 49) or about her weight loss. (*Id.*) To ensure compliance with his rulings, the district judge required that the portion of the deposition of respondent Redmond concerning conversations with the social worker be supervised by a magistrate judge. (Pet.App. 38-39.)

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[8] Respondents' counsel subsequently asserted that "disclosure of communications between [respondent Redmond] and Ms. Beyer would be injurious in the extreme — it would totally destroy a professional, therapeutic relationship." (App. 35.) Respondents did not submit any evidentiary material to support this assertion.

[9] Respondents did not challenge this ruling on appeal.

[10] The proposed rule is set out in the addendum, *infra.*

[11] These rulings came in response to petitioner's motions to compel (App. 31-32, 62-63, 70-72) and for sanctions (App. 64-65, 75-76).

B. The Sanction Rulings

When her deposition was resumed, respondent Redmond asserted that she could not recall the contents of her conversations with the social worker: Redmond stated that she was unable to remember whether she told Beyer that she had shot someone to death, whether she told Beyer that she had drawn her gun, whether she had discussed with Beyer her belief that she was justified in shooting Ricky Allen, or whether she had told Beyer why she had shot Ricky Allen.[12] (App. 64.)

On consideration of petitioner's motion for sanctions (App. 64-65), the district judge set the matter for an evidentiary hearing. (Order, December 4, 1992.) After hearing from respondent Redmond, the district court refused to credit Redmond's claimed inability to recall what she had told the social worker about the facts of the shooting:

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[12] At trial, respondent Redmond claimed an inability to recall eleven specific areas that were relevant to her use of deadly force. (App. 102-07.)

> * * * I do not find that what has been said by Ms. Redmond today is entirely believable. I really do not find it believable that she would have such a nearly total absence of recollection about discussions about an enormously important event in her life, unless the mindset that she was approaching the questions with, was one that adopted an extraordinarily blinded approach. (Pet.App. 52)

In response to respondent Redmond's claimed inability to recall, the district judge ordered that petitioner's attorneys would be permitted to review the notes made by the social worker "which relate to the subject matter" of conversations (Pet.App. 58) and could depose the social worker about conversations that were directly relevant to the lawsuit. (Pet.App. 57.) The district judge stated that he was not permitting "open season" (Pet.App. 57) and admonished counsel to refrain from questioning the social worker about conversations not directly related to the lawsuit. (Pet.App. 57-58.)

After the social worker had been redeposed about the subject matters of conversations and had produced three pages of heavily redacted notes, petitioner returned to the district court, seeking permission to conduct a broader inquiry. (App. 70-72.) Petitioner argued that more detailed questioning was required because of contradictions between respondent Redmond and the social worker.[13] The district court granted this motion and ordered the social worker to produce her unredacted notes "for counsel's eyes only." (App. 73.)

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[13] Respondent Redmond had testified at her deposition that she had not met any members of petitioner's family before the incident and that she did not recognize Ricky Allen. (App. 70.) Respondent Redmond had also testified that at the time of the shooting, she was not suffering any stress in personal relationships. The social worker stated that respondent Redmond had told her that she had met Ricky Allen before killing him and that she had been having "a relationship problem" at the time of the shooting. (App. 70-71.)

The social worker refused to produce her records without respondent Redmond's authorization. (App. 75.) When respondent refused to provide this authorization (*id.*), the district court held an evidentiary hearing on petitioner's motion for sanctions.[14] (App. 75-76.)

After an evidentiary hearing, the district court found:

> [T]hat there has been and continues to be a willful flouting of the Court's orders and authority, both by defendant MaryLu Redmond and by Karen Beyer, who is the employee and agent of the other defendant, the Village of Hoffman Estates. And I regret to say that has continued despite the fact that I have been more than patient, I believe, in giving each of them the opportunity for compliance. (Pet.App. 61)

As a sanction, the district judge stated that he would preclude Redmond from testifying at trial "as to her version of the event in which she shot Ricky Allen." (Pet.App. 62.)

On the eve of trial, respondents asked the district court to reconsider its order barring Redmond's testimony. (App. 77-82.) The district court granted this motion, permitting Redmond to testify, but holding that the jury would be instructed about an adverse inference from non-production of the counseling records. (App. 83-90.) The district judge stated that the instruction about the adverse inference did not

rest on his rejection of the claimed privilege (App. 89), but was the "least severe sanction" (App. 88) for respondents' "open defiance" of court orders. (*Id.*) The district judge reiterated this view in an *in limine* ruling, stating that respondent Redmond's decision to withhold evidence had prevented him from making "the kind of calculated and careful judgment" that required "all of the facts." (App. 94.)

C. References at Trial to Conversations with the Social Worker

At trial, petitioner impeached respondent Redmond with her inability to recall the content of her conversations about the shooting with Beyer. (App. 102-07.) Respondent Redmond testified on cross-examination that her recollection about how she had been holding the gun when she shot Ricky Allen was better at the time of trial than it had been a few hours after the incident. (App. 141.) Petitioner elicited testimony from Beyer that at one point in counseling, respondent could not recall pulling the trigger (App. 113), but that she was able to remember details of the incident and "even later recalled pulling the trigger" after 50 sessions. (*Id.*)

In final arguments, petitioner contended that respondent was trying to hide the truth by claiming an inability to recall her conversations with Beyer. (App. 168-169.) Petitioner pointed out the conflict between respondent and Beyer about the personal problems that respondent was having on the day of the shooting. (App. 168.) Petitioner also argued that respondent Redmond had "made up the story to help her live with this horrible thing that she did back in 1991." (App. 173)

The district court instructed the jury that it was entitled to draw a negative inference from respondents' refusal to produce Beyer's notes. (Pet.App. 67.)

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[14] Respondents did not seek to submit the records for *in camera* inspection.

D. Ruling on Appeal

On respondents' appeal, the Seventh Circuit held that the district court had erred in requiring disclosure of any of the conversations between respondent and the social worker. The court of appeals recognized the conflict between the circuits on the existence of a psychotherapist privilege (Pet.App. 16-17) and held that a broad psychotherapist privilege would "encourage troubled individuals . . . to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors." (Pet.App. 18.) The Seventh Circuit concluded that the privilege should extend beyond psychiatrists and psychologists and apply to all "mental health care providers as well, including licensed clinical social workers." (Pet.App. 22 n.19.)

In the view of the Court of Appeals, the inquiry permitted by the district court into the subject matter of conversations with the social worker resulted in cumulative evidence (Pet.App. 23) and involved "confidential communications" that were protected from disclosure. (*Id.*) The Seventh Circuit characterized respondent Redmond's inability to recall conversations with the social worker as "noncompliance with the district court's order" which was "justified" because truthful answers would have resulted in "irreparable injury." (Pet.App. 8 n.8.) Without reaching petitioner's argument that the district court's instruction on failure to produce evidence was a permissible sanction for Redmond's failure to abide by discovery orders, the Seventh Circuit reversed the jury verdict and remanded for a new trial. (Pet.App. 24.)

SUMMARY OF ARGUMENT

Federal courts have the authority under Rule 501 of the Federal Rules of Evidence to establish new evidentiary privileges "in the light of reason and experience." This Court has been cautious in creating exceptions to the principle that the public has a right to every person's evidence, and has carefully weighed the costs and benefits of each new claimed privilege.

There are substantial costs to the broad psychotherapist-client privilege sought by respondents. Therapists are not officers of the court, have no interest in the search for truth, and through psychotherapy, may create both correct and incorrect recollections of an incident.

This civil rights case turned on respondent Redmond's ability to recount believably the events surrounding her use of deadly force to kill petitioner's decedent Ricky Allen. Respondent Redmond testified that she had shot Allen because he was armed with a knife and about to strike another; petitioner presented evidence from Allen's siblings that Allen was unarmed and not threatening anyone when he was shot and killed.

Respondent Redmond's recollections of the incident had been sharpened before trial by more than fifty sessions with a social worker employed by respondent Village of Hoffman Estates. Redmond testified that her recollection of the shooting was better at the time of trial than it had been shortly after the shooting. The social worker confirmed that Redmond's ability to recall increased during counseling.

The broad psychotherapist privilege urged by respondents would withhold from the jury evidence that respondent Redmond's recollections had been enhanced by counseling. The privilege would also withhold from the jury contradictions between Redmond's trial testimony and her pre-trial statements to the social worker.

The benefits of the broad psychotherapist privilege advocated by respondents are highly speculative. The scientific evidence to support respondents' demand for absolute confidentiality is inconclusive. Moreover, while all health care professions include some rule of confidentiality within their ethical standards, there is general acceptance that an expectation of absolute confidentiality in psychotherapy is unrealistic: without exception, therapists recognize a duty to reveal confidential information when the welfare of others is significantly threatened.

State therapist privilege statutes do not support the broad privilege urged by respondents in this case. Many states afford a lesser privilege to social workers than to psychiatrists and licensed clinical psychologists. The myriad of exceptions in the state statutes reflect decisions that the need to enforce civil and criminal law outweighs the benefits of a privilege. The same balancing supports denying a federal privilege to those who violate federal civil rights statutes.

The privacy interests involved in confidential communications with a psychotherapist can be fully protected by the federal courts without the creation of a new privilege. As with the protection of editorial processes in *Herbert v. Lando*, 441 U.S. 153 (1979), Rule 26 of the Federal Rules of Civil Procedure provides an adequate tool to regulate unwarranted invasions of privacy in civil cases. The record in this case shows how a district judge may carefully balance privacy interests with a litigant's right to prosecute a federal civil rights case. The Court should reject the privilege fashioned by the Court of Appeals and reinstate the judgment of the district court.

ARGUMENT

A. RULE 501

Rule 501 of the Federal Rules of Evidence is the starting point for considering the correctness of the psychotherapist privilege fashioned by the Court of Appeals. The Rule provides in pertinent part that privileges are "governed by the

principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."

The Court has refused to use the authority of Rule 501 "expansively." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990). Both before and after adoption of Rule 501, the Court has declined to create any privilege not recognized at common law: the Court has recognized a common law privilege for trade secrets, *E.I. DuPont De Nemours Powders Co. v. Masland*, 244 U.S. 100, 103 (1917), and a common law privilege for military secrets, *United States v. Reynolds*, 345 U.S. 1 (1953), but the Court has turned down requests for a newsgatherer's privilege, *Branzburg v. Hayes*, 408 U.S. 665 (1972), an accountant's privilege, *Couch v. United States*, 409 U.S. 322 (1973), an editorialist's privilege, *Herbert v. Lando*, 441 U.S. 153 (1979), a state legislator's privilege, *United States v. Gillock*, 445 U.S. 360, 367 (1980), an accountant's work product privilege, *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984), and an academic peer-review privilege. *University of Pennsylvania v. EEOC, supra.*

The Court's purposeful unwillingness to create evidentiary privileges is consistent with the history of Rule 501 and with the policies of the Federal Rules of Evidence.

1. The History of Rule 501 Supports the Court's Narrow Construction of the Rule

Rule 501 is derived from former Rule 26 of the Federal Rules of Criminal Procedure,[15] and was substituted by Congress for the privilege provisions which had been proposed by the Advisory Committee of the Judicial Conference of the United States.

Under the rules proposed by the Advisory Committee, "federal courts would have been permitted to apply only nine specifically enumerated privileges, except as otherwise required by the Constitution or provided by Acts of Congress." *United States v. Gillock*, 445 U.S. 360, 367 (1980). The privileges proposed by the Advisory Committee omitted a physician-patient privilege and included a psychotherapist privilege limited to communications with psychiatrists and licensed clinical psychologists.[16]

At hearings in the House, the privilege provisions of the Proposed Rules of Evidence were among the most debated — as Representative Hungate explained to the Senate Judiciary Committee, "50 percent of the complaints in our committee related to the section on privileges." Proposed Rules of Evidence: Hearings on H.R. 5643 Before the Senate Comm. on the Judiciary, 93d Cong. 2d Sess. 6 (1974).

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[15] Former Criminal Rule 26 provided as follows:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

[16] Proposed Rule 504 is set out in the addendum, *infra*.

The Advisory Committee's proposals were criticized for failing to provide a privilege, *inter alia*, for physicians,[17] social workers[18] and accountants.[19] Rather than create new privileges, the House abandoned the specific privileges enumerated by the Advisory Committee and left the law of privileges "where we found it." Proposed Rules of Evidence: Hearings on H.R. 5643 Before the Senate Comm. on the Judiciary, 93d Cong. 2d Sess. 6 (1974) (remarks of Rep. Hungate). The Senate accepted this approach.[20]

As enacted by Congress, Rule 501 adopts the standard of *Wolfle v. United States*, 291 U.S. 7 (1934), that "the rules governing the competence of witnesses in criminal trials in the federal courts . . . are governed by common-law principles as interpreted and applied by the federal courts in the light of reason and experience."[21] *Id.* at 12, citing *Funk v.*

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[17] Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong. 1st Sess. 153, 193, 342, 448, 563 (1973).

[18] Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong. 1st Sess. 458 (1973).

[19] Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong. 1st Sess. 583 (1973).

[20] The Senate also proposed a change in the language of Rule 501 to make plain that state privilege rules applied in diversity cases. *See* Sen. Rep. 93-1277, 93rd Cong. 2d Sess. 1974, 1974 U.S.C.C.A.N. 7051. The legislative history is thoroughly canvassed by Professor Imwinkelried in *An Hegelian Approach to Privileges under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 Neb. L. Rev. 511, 517-523 (1994).

[21] Before adoption of Rule 501, privileges in federal civil cases were governed by Rule 43(a) of the Federal Rules of Civil

United States, 290 U.S. 371 (1933).

2. The Federal Rules of Evidence Favor the Admissibility of Relevant Evidence

The overall theme of the Federal Rules of Evidence favors the admissibility of evidence so that cases are decided on the merits. In adopting a "broad approach to admissibility [of official records] under Rule 803(8)(C)" in *Beech Aircraft Corp v. Rainey,* 488 U.S. 153 (1988), the Court described the Federal Rules of Evidence as having a "liberal thrust" for the admissibility of evidence. *Id.* at 169. The Court reaffirmed this view in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 113 S.Ct. 2786 (1993), stating that the "basic standard of relevance [of the Federal Rules of Evidence] . . . is a liberal one," *id.* at 2793, and describing the Rules of Evidence as having a "permissive backdrop." *Id.* at 2794.

The same "broad approach to admissibility" appears in Articles IV, VI, VII, VIII, and IX of the Federal Rules of Evidence. As Professor Imwinkelried has pointed out,[22] Rule 401 incorporates "an exceptionally broad definition of 'relevant' evidence."[23] Rule 402 "impliedly abolish[es]

Procedure. Under that rule, the court would evaluate claims of privilege by first consulting federal statutes, then considering the rules of evidence previously used by federal courts in suits in equity, and, finally, relying on the rules of evidence applied in the courts of the state in which the federal court is sitting.

[22] Imwinkelried, *supra note 20,* at 537-41.

[23] Under Rule 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This is a lesser requirement than other evidence statutes, such as California Evidence Code Section 210, which requires that to be relevant, an item of evidence must pertain to a "disputed" issue in the case.

uncodified exclusionary rules of evidence."[24] Rule 403 permits the trial judge to exclude relevant evidence only when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . " *See United States v. Huddleston,* 485 U.S. 681, 688 (1988). Similarly, Rule 404 was amended by Congress to place "greater emphasis on admissibility than did the final Court version." *United States v. Huddleston, supra.*

Rule 601 "eliminated all grounds of incompetency not specifically recognized" in the Federal Rules.[25] Rule 608 broadened the admissibility of impeachment evidence by permitting the admission of opinion as well as reputation evidence. Rule 613 relaxed the standards for the introduction of evidence of a witness' prior inconsistent statements. *See* Imwinkelried, *supra note 20* at 538.

Rule 701 "permits even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact." *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 169

Imwinkelried, *supra note 20* at 537 & n.278.

[24] Imwinkelried, *supra note 20* at 538 & n.280. Rule 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

[25] Advisory Committee Note to Rule 601. Professor Imwinkelried describes this as a "revolutionary" change. Imwinkelried, *supra note 20* at 538.

(1988). Rules 703 and 704 allow experts to rely on hearsay reports and offer opinions on the ultimate issue.

Article VIII codifies several hearsay exceptions which were minority doctrines at common law.[26] Article IX overturned common law rules on authentication and Article X "loosened several of the strictures of the common-law best evidence rule." Imwinkelried, *supra note 20* at 540.

The "permissive backdrop" of the Federal Rules of Evidence, *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra,* 113 S.Ct. at 2794, is flatly at odds with respondents' request that the Court create a new rule to exclude relevant evidence.

3. The Narrow Construction of Rule 501 Is Consistent with the Court's Long Standing Reluctance to Create Rules to Exclude Relevant Evidence

This Court has long been cautious in exercising its power "in the light of reason and experience" to change the rules of evidence.[27] "[J]udicial innovations explicitly expanding or contracting admissibility of evidence are rare." *Upshaw v. United States,* 335 U.S. 410, 415 (1948) (Reed, J., dissenting). As a general rule, the Court has been content both before and after the adoption of Rule 501 to recognize only privileges that existed at common law, which did not

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[26] These include the present sense impression exception under Rule 803(1), the use of scientific treatises under Rule 803(18), the official record exception, under Rule 803(8), and the state of mind and dying declaration exceptions of Rule 803. See Imwinkelried, *supra note 20* at 539 & nn.297, 298.

[27] *See Michelson v. United States,* 335 U.S. 469, 485-86 (1948) ("the task of modernizing the longstanding rules . . . is one of magnitude and difficulty which even those dedicated to law reform do not lightly undertake.")

recognize a counseling privilege.[28]

The Court has been especially reluctant to adopt new rules to exclude relevant evidence and has adhered to the principle that "the public . . . has a right to every man's evidence." *United States v. Bryan,* 339 U.S. 323, 331 (1950). As the Court stated in *United States v. Nixon,* 418 U.S. 683 (1974), "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* at 709.

In *Branzburg v. Hayes,* 408 U.S. 665 (1972), the Court was asked to recognize a newsgatherer's privilege. The Court acknowledged the First Amendment interests involved in the claimed privilege, but refused to create a new privilege, relying on the trial court's power to ensure that grand juries "operate within the limits of the First Amendment as well as the Fifth." *Id.* at 708. The Court followed this approach in *Herbert v. Lando,* 441 U.S. 153 (1979), where the Court was asked to recognize a privilege that would have foreclosed inquiry into the "thoughts, opinions, and conclusions with respect to material gathered by [a journalist] and about his conversations with his editorial colleagues." *Id.* at 158. The Court recognized that editorial discussions have "constitutional protection from casual inquiry," 441 U.S. at 174, but declined to recognize a privilege, holding that the district court's power to regulate discovery provided ample protection for the privacy interests. *Id.* at 177.

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[28] For this reason, the lower federal courts have in general refused to recognize a counseling privilege. *See, e.g., Slakan v. Porter,* 737 F.2d 368 (4th Cir. 1989); *United States v. Moore,* 970 F.2d 48 (5th Cir. 1992); *In re Grand Jury Proceedings,* 867 F.2d 562 (9th Cir. 1989); *United States v. Burtrum,* 17 F.3d 1299 (10th Cir. 1994); *Hancock v. Hobbs,* 967 F.2d 462 (11th Cir. 1992). The Second and Sixth Circuits have each recognized a limited psychiatrist-patient privilege. *In re Zuniga,* 714 F.2d 632, 637 (6th Cir. 1983); *In re Doe,* 964 F.2d 1325 (2d Cir. 1992).

The Court concluded in *Trammel v. United States,* 445 U.S. 40 (1980), that "reason and experience" warranted narrowing the witness-spouse privilege. *Id.* at 53. In making this decision, the Court evaluated how the privilege had fared in the states, *id.* at 48-50, and followed the "utilitarian approach" of 8 J. Wigmore, *Evidence* §2285, at 527 (McNaughton Rev. 1961), in weighing the cost-benefit of allowing one spouse to exclude adverse testimony of his (or her) spouse. *Id.* at 50-53.

We follow this approach below and show that excluding evidence in this case because of a psychotherapist-client privilege would deprive the jury of crucial information about respondent Redmond's credibility.

B. CRUCIAL EVIDENCE WOULD BE EXCLUDED BY A PSYCHOTHERAPIST-PATIENT PRIVILEGE

The broad privilege sought by respondents would withhold from the jury crucial evidence bearing on respondent Redmond's credibility — the issue on which the case turned.

Petitioner challenged respondent Redmond's claim that her memory of the shooting was better at trial that it had been shortly after the incident (App. 141.) with Redmond's admissions that she could not recall crucial conversations with the social worker. Respondent Redmond testified that she could not recall whether she ever told Beyer that she had shot someone to death, whether she had told Beyer that she had drawn her gun, whether she ever discussed with Beyer her belief that she was justified in shooting Ricky Allen, and whether she ever told Beyer why she felt she had to shoot Ricky Allen. (App. 102-07.) These are matters that a jury would expect a person to recall; in this case, a single "I don't remember" was an admission of wrongdoing.

In his classic treatise, Wellman describes a case where three days of cross-examination had failed to pierce a witness' claim that he was ignorant and illiterate until the witness evaded a single question ("Were you not a Rabbi in the old country?") with "I don't remember." Wellman, *Art of Cross Examination,* 129 (4th ed. 1936). This is hardly a remarkable concept:

> Honest inability to remember at trial raises serious questions about clarity of memory at the time of the pretrial statements. The deceit inherent in feigned loss of memory lessens confidence in the probity of prior assertions.

California v. Green, 399 U.S. 149, 198 (1970) (Brennan, J., dissenting).

The broad privilege sought by respondents would withhold from the jury Redmond's admission to the social worker (which Redmond denied at trial) that early in counseling she had been unable to remember pulling the trigger. The broad privilege would also withhold from the jury that respondent's enhanced memory came after more than fifty meetings with a person employed by respondent Village of Hoffman Estates.

An effective tactic in cross-examination is to bring before the finder of fact the extent to which a witness has rehearsed his (or her) testimony or had his (or her) memory refreshed in pre-trial preparation.[29] Preventing the jury from learning that a witness' trial testimony had been preceded by more than 50 discussions about the incident threatens the integrity of the fact finding process, especially when the witness claims that her recollection is sharper at trial than it had been hours after the incident.

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[29] In a legendary example, cross examination demonstrated that "the prosecutor in that case 'phoneyed up' the evidence and turned his witnesses into 'human tape recorders' capable of parroting their narrative testimony over and over again without the slightest degree of variation." Underwood & Fortune, *Trial Ethics* §11.3, at 320 (1988).

The Court was confronted with a related issue when it evaluated a state rule that barred hypnotically refreshed testimony in *Rock v. Arkansas,* 483 U.S. 44 (1987). The Court noted that hypnosis appears to "increase both correct and incorrect recollections." *Id.* at 59. The same is true for psychotherapy.

A therapist is not an officer of the Court, does not owe any allegiance to the administration of justice, and unlike an attorney, *see Nix v. Whiteside,* 475 U.S. 157, 169 (1986), has no duty to prevent and disclose frauds. A therapist's obligation is to the mental health of his (or her) client. To achieve this goal, a therapist may offer suggestive cues, following an approach outlined by Freud for uncovering traumatic memories by "represent[ing] ourselves as infallible, till at last we are really told something."[30] A counselor can cause "behavioral confirmation" — forming an erroneous impression of a client and then causing the client "to behave in ways consistent with [the] erroneous impressions." Copeland & Snyder, *When Counselors Confirm: A Functional Analysis,* 21 Pers. and Social Psych. Bull. 1210 (1995). A counselor can change recollections about an incident by leading questions, suggesting details, or presenting incorrect information. Loftus & Garry, *Pseudomemories without Hypnosis,* 42 Int'l J. of Clinical and Exp. Hypnosis 363, 366-368 (1994). There is little question that "memory is malleable even for life's most traumatic experiences."[31]

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[30] Breuer & Freud, Studies in Hysteria (1893), reprinted in 2 J. Strachey (ed., transl.), *The Standard Edition of the Complete Psychological Works of Sigmund Freud,* 279, cited in Powell & Boer, *Did Freud Mislead Patients to Confabulate Memories of Abuse?,* 74 Psych. Reports, 1283, 1297 (1994).

In *Rock v. Arkansas, supra,* the Court observed that that cross-examination would be "an effective tool for revealing inconsistencies [in hypnotically refreshed testimony]." 483 U.S. at 60. The broad privilege advocated by respondents would deprive litigants of this effective tool when, as in this case, a compelling argument was made that respondent Redmond's testimony had been synthesized by counseling into a "story to help her live with this horrible thing that she did." (App. 173.)

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[31] Loftus, *The Reality of Repressed Memories,* 48 Amer. Psychologist 518, 530 (1993). As summarized by Professor Loftus (at 531):

> For example, one study examined people's recollections of how they heard the news of the 1986 explosion of the space shuttle *Challenger* (citation omitted). Subjects were questioned on the morning after the explosion and again nearly three years later. Most described their memories as vivid, but none of them were entirely correct, and more than one third were wildly inaccurate.
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> * * *
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> Another study (citation omitted) demonstrated the malleability of memory for a serious life-and-death situation. The subjects had attended an important high school football game at which a player on the field went into cardiac arrest. Paramedics tried to resuscitate the player and apparently failed. The audience reactions ranged from complete silence, to sobbing, to screaming. (Ultimately, fortunately, the player was revived at the hospital.) Six years later, many of these people were interviewed. Errors of recollection were common. Moreover, when exposed to misleading information about this life-and-death event, many individuals absorbed the misinformation into their recollections. For example, more than one fourth of the players were persuaded that they had seen blood on the player's jersey after receiving false suggestion to this effect.

The Court of Appeals was in error in dismissing as "cumulative" evidence about the conversations between respondent Redmond and the social worker. (Pet.App. 23.) Redmond's claimed inability to recall the contents of conversations with Beyer is not cumulative, but is highly relevant evidence. Moreover, while there were eyewitnesses to the shooting, the credibility of these witnesses — each a sibling of petitioner's decedent — was vigorously challenged by respondents. Only respondent Redmond and the social worker could testify about the more than fifty therapy sessions that had enhanced Redmond's recollections about the shooting. The jury was entitled to hear what Redmond had done after the shooting to improve her memory.

"[W]e can all agree that it is a misfortune when a lawsuit is won by the party who would lose if all the facts were known, and we increase the risk of such a miscarriage of justice whenever we allow an important witness to keep any helpful facts away from the judge and jury."[32] Such would be the result if the Court adopted the broad privilege sought by respondents. We show below that the benefits of the requested privilege are wholly speculative and do not justify impairment of the fact finding process.

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[32] Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?* 52 Yale. L.J. 607, 609 (1953).

C. THE BENEFITS OF THE REQUESTED PRIVILEGE ARE SPECULATIVE

There is no dispute that all health care professions include some rule of confidentiality within their ethical standards.[33] Nor is there a dispute that confidentiality is not absolute: While at one time therapists could unabashedly argue for an absolute privilege, "almost everyone writing in this area agrees that an expectation of absolute confidentiality in psychotherapy is unrealistic,"[34] and the American Psychiatric Association explicitly recognizes that a therapist must be able "to reveal confidential information related by patients when the welfare of others is significantly threatened."[35]

Modern limitations on absolute confidentiality undercut the "counseling folklore,"[36] accepted by the Court of Appeals

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[33] *See, e.g.*, American Medical Association, *Revised Principles of Medical Ethics* (1980); American Psychiatric Association, *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (1981); American Psychological Association, *Ethical Principles of Psychologists* (1992); National Association of Social Workers, *Code of Ethics* (1979); American Personnel and Guidance Association, *Ethical Standards* (1981); American Nurses' Association, *Code of Ethics* (1976).

[34] Appelbaum, Kapen, Walters, Lidz, & Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psychiatry & Law 109 (1984).

[35] Green, *The Ethical Limits of Confidentiality in the Therapeutic Relationship*, 17 General Hospital Psychiatry 80, 82 (1995). Professor Slovenko's views on this issue have also changed. *See* Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 Cath. U. L. Rev. 649, 656 (1974); Slovenko, *Letter*, 151 Am. J. Psychiatry 626 (1994).

[36] McGuire, Graves & Glau, *Depth of Self-Disclosure as a Function of Assured Confidentiality and Videotape Recording*, 64 J. Counseling and Development 259, 262 (1985).

(Pet.App. 23), that complete secrecy is required for effective psychotherapy.[37] In the view of the Seventh Circuit, respondent's ability "to work out the pain and anguish undoubtedly caused by Allen's death *in all probability* depended to *a great deal* upon her trust and confidence in her counsel Karen Beyer." (Pet.App. 23, emphasis added.) There is, however, no evidence that respondent Redmond felt "pain and anguish." Nor is there any reason to believe that respondent was receiving psychoanalysis, rather than some other, more common form of counseling: therapists require "uncensored access to all of their patient's thoughts and feelings in relatively few cases."[38]

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[37] This rationale appears in Guttmacher and Weihofen, *Psychiatry and the Law* 272 (1952), is a part of the Advisory's Committee's Note to Proposed Rule 504, reprinted in 56 F.R.D. 183, 242 (1973), and has been widely repeated. *See, e.g., Taylor v. United States,* 222 F.2d 398, 401 (D.C.Cir. 1955); Louisell, *The Psychologist in Today's Legal World: Part II,* 41 Minn.L.Rev. 731, 745 (1957); Note, *The Social Worker-Client Relationship and Privileged Communications,* 3 Wash.Univ.L.Q. 362, 380-82 (1965); Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers,* 61 Cal. L. Rev. 1050, 1053-54 (1973); Saltzburg, S.A., *Privileges and Professionals: Lawyers and Psychiatrists,* 66 Va.L.Rev. 596, 620 (1980); Comment, *Evidence: The Psychotherapist-Patient Privilege under Federal Rule of Evidence 501,* 23 Washburn L.J. 706, 709 (1984); Note, *The Psychotherapist-Patient Privilege in Federal Courts,* 59 Notre Dame L.Rev. 791, 795 (1984); Soffin, *The Case for a Federal Psychotherapist-Patient Privilege that Protects Patient Identity,* 1985 Duke L.J. 1217, 1225 (1985).

[38] Shuman, Weiner & Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada,* 9 Int'l J. of Law and Psy. 393, 416 (1986).

Researchers have made several efforts to test the "counseling folklore" that confidentiality is essential to psychotherapy. The scientific evidence to support the benefits of confidentiality is, at best, inconclusive. As one commentator has observed, "the results of the studies are either used or ignored by both sides of the issue.[39]

In the conclusion of a trilogy of studies on confidentiality, the researchers studied the differences between the civil law province of Quebec, where a psychotherapist-client privilege is recognized, and the rest of Canada, where the privilege is not recognized. Shuman, Weiner & Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada,* 9 Int'l J. of Law and Psy. 393 (1986). The researchers concluded that "[p]sychotherapy occurs without regard to the existence of a privilege." *Id.* at 417. This result confirmed two earlier studies that the existence of a privilege had no effect on disclosures once therapy had begun. Shuman, D.W. & Weiner, M.F., *Privilege — A Comparative Study,* 12 J. Psych & Law 373, 381 (1984); Shuman, D.W. & Weiner, M.F., *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege,* 69 N.C. Law. Rev. 893, 924-27 (1982).

Other researchers have reached somewhat conflicting results in studies involving small samples.[40] These studies are an insubstantial basis for a privilege. Moreover, there are therapeutic benefits to limiting the privilege:

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[39] Domb, *I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege,* 5 J.L. & Health 209, 227 (1990).

[40] *See, e.g.,* Nowell & Spruill, *If It's Not Absolutely Confidential, Will Information Be Disclosed,* 24 Prof. Psych: Research and Practice 367, 368 (1993) (study of 75 undergraduate students); Taube & Elwork, *Researching the Effects of Confidentiality Law on Patients' Self-Disclosures,* 21 Prof. Psych: Research and Practice 72 (1990) (42 outpatients); Appelbaum, Kapen, Walters, Lidz, & Roth, *Confidentiality: An Empirical Test of the*

> The absence of the privilege could actually *prevent* harmful behavior. Were the absolute psychotherapist-patient privilege removed from the typical therapeutic relationship, those patients who make potentially incriminating communications to their therapists (e.g., of the desire or intent to commit a crime) might be less likely to act on those urges. They might be deterred from engaging in behaviors that have foreseeable legal consequences in order to avoid disclosure of the communication in a future criminal proceeding. In short, the removal of the psychotherapist-patient privilege could be therapeutically beneficial.
> Klotz, *Limiting the Psychotherapist-Patient Privilege: The Therapeutic Potential,* 27 Crim.L.Bull 416, 417 (1991).

A second rationale for a psychotherapist privilege is that the absence of confidentiality will deter persons from obtaining psychotherapy.[41] But for the privilege sought in this case, the only persons who could possibly be affected by rejection

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Utilitarian Perspective, 12 Bulletin of the American Academy of Psychiatry and the Law, 109 (1984) (58 outpatients).

[41] This is the primary argument advanced in favor of a privilege to protect the identity of a therapy client. Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 Wayne L. Rev. 175, 188-89 (1960); Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers,* 61 Cal.L.Rev. 1050, 1053 (1973).

of the privilege would be those who become litigants in federal court, a small, if not infinitesimal number of persons. Moreover, research on this claim is inconclusive: confidentiality appears low on a list of important items in choosing a therapist.[42]

A third theory that has been urged to support a psychotherapist privilege is that preserving confidentiality shows respect for the patient's autonomy, dignity, and fidelity.[43] Respect for other, equally valid values is shown when a therapist discloses information when ordered by the court. By complying with a court order, the therapist is upholding society's quest for truth and justice and respecting the client's autonomy and dignity to be held accountable for his (or her) actions.

A final argument in support of a psychotherapist privilege is that preserving confidentiality implements a right to privacy.[44] But the right to privacy is not absolute, *Whalen v. Roe,* 429 U.S. 589 (1977), and individual privacy is transcended by a variety of public interests, as as reflected in the wide variations in state privilege statutes.

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[42] Braaten, Otto, Handelsman, *What Do People Want to Know About Psychotherapy?* 30 Psychotherapy 565, 568 (1993). *See also* Nowell & Spruill, *If It's Not Absolutely Confidential, Will Information Be Disclosed,* 24 Prof. Psych: Research and Practice 367 (1993), concluding that more detailed explanations of exceptions to confidentiality would not deter prospective therapy clients.

[43] Appelbaum, Kapen, Walters, Lidz, & Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective,* 12 Bulletin of the American Academy of Psychiatry and the Law, 109 (1984).

[44] *See, e.g., Developments in the Law-Privileged Communications,* 98 Harv. L. Rev. 1450, 1544 (1985).

D. STATE THERAPIST PRIVILEGE STATUTES CONTAIN A PANOPLY OF EXCEPTIONS

At the present time, every state and the District of Columbia appears to have adopted some protection for confidential communications with a psychiatrist or a clinical psychologist.[45] No state has adopted the broad privilege fashioned by the Court of Appeals in this case.[46] The various statutes reflect a potpourri of exceptions and conflicting views on the types of therapy relationships that are entitled to a privilege and implement each state's balancing of confidentiality and governmental interests.

1. Case by Case Balancing

In some states, the privilege is subject to a case by case balancing by the trial judge.[47] In Connecticut, communications with a social worker may be disclosed when the trial judge has determined "that it is more important to the interests of justice that the communications and records be disclosed than that the relationship . . . be protected."[48]

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[45] The West Virginia statute has been narrowly interpreted as not providing a psychotherapist-patient privilege. *See* Cleckley, *A Modest Proposal: A Psychotherapist-Patient Privilege for West Virginia*, 93 W. Va. L. Rev. 1, 37 n.234 (1990).

[46] Many states provide a lesser privilege for communications with social workers. See *infra* at 35-37.

[47] *See, e.g.,* N.H. Rev. Stat. Ann. §330-A-19 (Supp. 1993); N.C. Gen. Stat. §8-53.3 (1992 & Supp. 1992) (psychologists); N.C. Gen. Stat. §8-53.7 (1992 & Supp. 1992) (social workers); Va. Code Ann. §8.01-400.2 (Michie 1992) (counselors, psychologists, and social workers) W. Va. Code. §27-3-1(b)(3) (1992).

[48] Conn. Gen. Stat. Ann. § 52-146(q)(c)(4). Similar provisions appear in Ill. Compiled Stat. Ann. ch. 740, §110/10 (Smith-Hurd 1993), Mass. Gen. Laws, ch. 233, §20B (West 1986 & Supp. 1994), and South Carolina, S.C. Code Ann. §44-22-90.

2. Exceptions in Cases Involving Child Custody and Child Abuse

In some states, therapist communications that relate to child custody are not privileged when the mental state of one of the parents is at issue.[49] Virtually all states preclude any privilege in cases involving child abuse,[50] in proceedings to revoke a day care or foster care license,[51] or involving abuse of disabled or incapacitated adults.[52]

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[49] *See, e.g., Harbin v. Harbin*, 495 So.2d 72 (Ala. 1986).

[50] *See, e.g.,* Ariz. Rev. Stat. Ann. §13-3620 (1982 and Supp. 1992); Ark. Code Ann. §12-12-511 (Supp. 1994); Del. R. of Evid. 503(d)(4); Idaho R. of Evid. 518; La. Rev. Stat. Ann. §37:2363; Mo. Ann. Stat. §337.636(3) (Vernon Supp. 1994); N.M. Stat. Ann., §61-31-24 (Michie 1990 pamphlet) (social worker only); N.Y. Civ. Prac. L & R, §4508(3) (McKinney 1992 & 1994 Supp.) (social worker only); N.C. Gen. Stat. §8-53.3 (1992 & Supp. 1992); Okla. Stat. Ann. tit. 59, §1272.1(3) (West Supp. 1993) (social worker only); Or. Rev. Stat. Ann. §40.250(4) (1988 & Supp. 1992) (social worker only); R.I. Gen. Laws §5-37.3-3 to -4 (1987 & Supp. 1993); S.D. Codified Laws Ann. §36-26-30(3) (1987 & Supp. 1993) (social worker only); Vt. R. Evid. 503(d)(4); Va. Code Ann §8.01-400.2 (Michie 1992); W. Va. Code §30-30-12(a)(2) (Michie Supp. 1992) (social worker only); Wis. Stat. Ann. §905.04(4)(e) (West Supp. 1993); Wyo. Stat. §3327-123(a)(i) (Supp. 1993).

[51] *See, e.g.,* Minn. Stat. §595.02 (West 1988 & Supp. 1994).

[52] *See, e.g.,* Ariz. Rev. Stat. §46-4530 (1982 & Supp. 1992); La. Rev. Stat. Ann. §37:2363; N.C. Gen. Stat. §8-53.3 (1992 & Supp. 1992); Wyo. Stat. §3327-123(a)(i) (Supp. 1993).

3. Exceptions for Criminal Cases

In some jurisdictions, the privilege is unavailable in serious criminal cases,[53] or when the information pertains to a criminal act.[54] In the District of Columbia, Congress has exempted from the privilege communications involving fraud in receiving Social Security benefits.[55]

Many states restrict the privilege in criminal cases when a defendant raises an insanity defense[56] or a mental disability defense,[57] or when the "services of the therapist were sought, obtained, or used to enable or aid anyone to commit or plan a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud."[58] One state precludes the privilege in any judicial proceeding involving narcotics.[59]

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[53] In the District of Columbia, there is no privilege in criminal case where "the accused is charged with causing the death or, or causing injuries upon, a human being, and the disclosure is required in the interests of public justice." D.C. Code Ann. §14-307 (1989 and Supp. 1993). In Illinois, there is no privilege in investigations of and trials for homicide "when the disclosure relates directly to the fact or immediate circumstances of the homicide." Ill. Compiled Stat. Ann. ch. 740, §110/10 (Smith-Hurd 1993). Indiana and Wisconsin have similar provisions. Ind. Code Ann. §25-33-1-17 (Burns Supp. 1994); Wis. Stat. Ann. §905.04(4)(d) (West Supp. 1993).

[54] *See, e.g.*, Mo. Ann. Stat. §337.636 (Vernon Supp. 1994).

[55] D.C. Code Ann. §14-307(b)(4) (1989 and Supp. 1993).

[56] *See, e.g., Free v. State*, 455 So.2d 137 (Ala. Crim. App. 1984).

[57] *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3993 (1992 and Supp. 1993); D.C. Code Ann. §14-307 (1989 and Supp. 1993).

[58] Alaska R. of Evid. 504(d)(2). A similar provision appears in La. Code Evid. Ann. Art. 510 (West 1994 special pamphlet).

[59] Neb. Rev. Stat. §27-504 (1989 & Supp. 1992).

In some states, the privilege does not apply to communications made to procure narcotics unlawfully.[60]

4. Exceptions Implementing a Duty to Warn

In some states, all therapists have a duty to reveal information about the contemplation of a crime or a harmful act.[61]

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[60] Nev. Rev. Stat. §49.254 (1986 & Supp. 1994); R.I. Gen. Laws §5-37.3-3 to -4 (1987 & Supp. 1993).

[61] These provisions appear to have been adopted in response to the duty to warn recognized in *Tarasoff v. Board of Regents*, 17 Cal.3d 425, 551 P.2d 334 (1976). The statutes contain different formulations of this duty. In Alaska there is no privilege when an "immediate threat of serious physical harm to an identifiable victim is communicated to a psychologist or psychological associate by a client." Alaska Stat. §08.86.200(3) (1981 & Supp. 1992). In Illinois, the privilege yields when "disclosure is necessary to warn or protect a specific individual against whom a recipient has made a specific threat of violence." Ill. Compiled Stat. Ann. ch. 740, §110/10 (Smith Hurd 1993). In Louisiana, the privilege disappears when an "immediate threat of physical violence against a clearly identified victim or victims is disclosed to the psychologist." La. Rev. Stat. Ann. §37:2363. The South Carolina statute requires "an emergency where information about the patient is needed to prevent the patient from causing harm to himself or others." S.C. Code Ann. §22-90(A)(3) (Lawyers Co-op Supp. 1993). In Tennessee, there must be an "actual threat to physically harm an identifiable victim or victims" and the treating psychiatrist must believe that the patient is likely to carry out the threat. Tenn. Code Ann. §24-1-207 (Supp. 1993). Tennessee law does not have comparable provisions for clinical psychologists, Tenn. Code. Ann. §63-11-213 (Supp. 1993), or "certified master social workers." Tenn. Code. Ann. §63-23-107 (Supp. 1993). The Texas standard is a "probability of imminent physical injury by the patient to the patient or others." Tex. Code Ann. §611.004(a)(2). The provisions in West Virginia and Wyoming are similar. W. Va. Code §27-3-1 (Michie Supp. 1992); Wyo.

Other states have imposed the duty on social workers, but not on psychiatrists or clinical psychologists.[62] In California, there is no privilege in cases involving a dangerous patient when disclosure is necessary to prevent a threatened danger.[63] Rhode Island requires a judicial determination "that the individual's physical or mental condition is of imminent and serious danger to the physical or mental health of another person" before the therapist may warn about danger.[64] This provision, though, does not apply to social workers, for whom there is no privilege when "there is a clear and present danger to the safety of the patient or client or to other individuals."[65]

5. Reduced Confidentiality for Social Workers

Some states provide reduced confidentiality for therapy communications to social workers; nine states do not provide any protection for social workers.[66] In Kentucky, the trial

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Stat. §3327-123 (Supp. 1993).

[62] *See, e.g.,* Ark. Code Ann. §17-39-107 (Supp. 1994) (social workers but not psychologists); Idaho R. of Evid.518; Ind. Code Ann. §25-23.6-1.1 (Burns Supp. 1994); Iowa Code Ann. §154C.5 (social worker); Del. Code Ann. tit. 24, §3013; N.J. Stat. Ann. §45:15BB-13 (West Supp. 1994); N.M. Stat. Ann. §61-31-24(2) (Michie 1990 pamphlet); N.Y. Civ. Prac. L & R §4508(2) (McKinney 1992 & Supp. 1994); Ohio Rev. Code §2317.02(G)(1)(a) (Anderson Supp. 1993); Or. Rev. Stat. Ann. §40.250(3) (1988 & Supp. 1992); W. Va. Code §30-30-12(a)(2) (Michie Supp. 1992) (social worker only).

[63] *Menendez v. Superior Court,* 834 P.2d 786 (1992).

[64] R.I. Gen. Laws §5-37-3.6(2)(D) (1987 & Supp. 1993).

[65] R.I. Gen. Laws §5-38.1-4(b) (1987 & Supp. 1993).

[66] There does not appear to be a specific social worker privilege in Alabama, Alaska, Arizona, North Dakota, Pennsylvania, Texas, Utah, Washington, and Wyoming.

court may compel disclosure of information on a finding that the "substance of communication is relevant to an essential issue in the case; no available alternative means to obtain the substantial equivalent of the communication, and the need for the information outweighs the interest protected by the privilege."[67] In Maine, there is no privilege for social workers "when a court in the exercise of sound discretion deems the disclosure necessary to the proper administration of justice."[68] Maryland does not recognize a privilege for social workers in juvenile proceedings, guardianship and adoption proceedings initiated by a child placement agency, in proceedings concerning disabled persons, and criminal or delinquency proceedings involving child abuse or neglect.[69] In Nevada, a social worker does not have a privilege in an "administrative or court-related investigation or proceeding involving the welfare of his client."[70]

Oklahoma does not provide any social worker privilege for a communication that "pertains to criminal acts or violations of any law."[71] In South Dakota there is no privilege for a communication to a social worker "that reveals the contemplation of a crime or a harmful act."[72] In Oregon, there is no privilege when a social worker is a public employee and the employer determined that "examination in a civil or criminal court proceeding is necessary in the performance of the duty of the social worker as a public employee."[73]

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[67] Ky. R. of Evid. 506.

[68] Me. Rev. Stat. Ann. tit. 32, §7005 (West 1992).

[69] Md. Code. Ann. Cts. & Jud. Proc. §9-121 (1989 & Supp. 1993).

[70] Nev. Rev. Stat. §49.254 (1986 & Supp. 1994)

[71] Okla. Stat. Ann. tit. 59, §1261.6 (West Supp. 1993). The identical communication to a psychiatrist or clinical psychologist would be privileged. Okla. Stat. Ann. tit. 12, §2503 (West Supp. 1993).

[72] S.D. Codified Laws Ann. §36-26-30(2) (1987 & Supp. 1993).

6. Therapists Covered by Statutory Privileges

In its decision in this case, the Seventh Circuit created a privilege for all "mental health care providers" (Pet.App. 22 n.19) apparently seeking to include "any professional who provides counseling or mental health therapy, including social workers, psychiatric nurses, and counselors, as well as psychologists, and psychiatrists."[74] The states have made different choices about the class of persons covered by a therapist privilege. Some states also extend a privilege to licensed marital and family therapists,[75] "licensed professional counselor,"[76] psychiatric nurses,[77] any licensed registered nurse,[78] and certified professional art therapists.[79]

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[73] Or. Rev. Stat. Ann. §40.250 (1988 & Supp. 1992).

[74] Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other,* 75 Ky. L. J. 473, 475 n.1 (1986).

[75] Alaska R. of Evid. 504; Calif. Evid. Code §19010 (West 1966 & Supp. 1994); Col. Rev. Stat. §13-90-102 (1989 and Supp. 1993); Fla. Stat. Ann. §90.503 (West Supp. 1993); Ga. Code §24-9-21 (1982 & Supp. 1993).

[76] Ala. Code §34-8A-21; Col. Rev. Stat. §13-90-102 (1989 and Supp. 1993); Del. Code Ann. tit. 24, §3013; Ga. Code §24-9-21 (1982 & Supp. 1993).

[77] Calif. Evid. Code §19010 (West 1966 & Supp. 1994); Vt. R. Evid. 503; Ga. Code §24-9-21 (1982 & Supp. 1993); Ky. R. of Evid. 507.

[78] Iowa Code Ann. §622-10.

[79] Ky. R. of Evid. 506.

7. Legislative Value Judgments in the State Statutes

The various state statutes reflect differing choices about the relationships that are entitled to confidentiality and the circumstances in which "it is better to prosecute offenders than it is to provide them with treatment."[80] The states have concluded that some interests, e.g., prosecution in child abuse cases, are more important than confidentiality. The same balancing would justify rejection of a counseling privilege in federal civil rights cases.

E. ENFORCEMENT OF FEDERAL CIVIL RIGHTS STATUTES OUTWEIGHS THE NEED FOR A BROAD PSYCHOTHERAPIST PRIVILEGE

The variations in the state privilege statutes reflect the different way in which each state has balanced a therapy client's interest in confidentiality with the state's interest in enforcing its civil and criminal laws. The same balancing would justify rejection of a privilege in federal civil rights cases.

Federal civil rights statutes provide a remedy for violations of "the Nation's fundamental laws," which Congress considers of "the highest importance." *City of Riverside v. Rivera,* 477 U.S. 561, 575 (1986). 42 U.S.C. §1983 provides a vehicle to enforce the provisions of the Fourteenth Amendment "against State action . . . whether that action be executive, legislative, or judicial." *Ex parte Virginia,* 100 U.S. 339, 346 (1879). The statute provides a "uniquely federal remedy against incursions under the claimed authority of state law," *Mitchum v. Foster,* 407 U.S. 225, 239 (1972), In our view, it is better to preserve this unique federal remedy than provide secret counseling for those who, under color of state law, have violated the Constitution.

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[80] Smith-Bell & Winslade, *Privacy, Confidentiality, and Privilege in Psychotherapeutic Relationships,* 64 Amer. J. Orthopsychiat. 180, 192 (1994)

F. PROPOSED RULE OF EVIDENCE 504 PROVIDES THE APPROPRIATE LIMITS FOR ANY FEDERAL PSYCHOTHERAPIST PRIVILEGE

If the Court chooses to create a federal psychotherapist privilege, it should adopt the limits of Proposed Rule of Evidence 504, which would have established a privilege applicable only psychiatrists and licensed clinical psychologists.

In *Allred v. State,* 554 P.2d 411 (Alaska 1976), one of two state appellate decisions that recognized a common law therapist privilege,[81] the Alaska Supreme Court refused to extend the privilege beyond psychiatrists and psychologists to social workers, relying on the difference between therapy and counseling. *Id.* at 418-22. A lesser privilege for social workers is consistent with this distinction.

Congressional hostility toward a privilege for social workers was evident in the legislative hearings.[82] As in *United States v. Gillock,* 445 U.S. 360 (1980), "[n]either the Advisory Committee, the Judicial Conference, nor this Court saw fit, however, to provide the privilege sought by [respondents]." *Id.* at 367. We suggest that the Court decline to fashion a new federal privilege, and instead leave the job of balancing the competing interests for determination by district judges on a case by case basis.

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[81] *State v. Evans,* 104 Ariz. 434, 454 P.2d 976 (1969), the Court essentially afforded retroactive application to a privilege statute that had been enacted after trial. This is consistent with the general rule that privileges have been adopted by state legislatures, rather than through case law.

[82] Representative Hungate explained the change to the privilege rules in somewhat hyperbolic language, stating that "when you open this up, the social workers and the piano tuners want a privilege. It is a very difficult matter, so we left that where it is for now." Proposed Rules of Evidence: Hearings on H.R. 5643 Before the Senate Comm. on the Judiciary, 93d Cong. 2d Sess., 6 (1974).

G. RELYING ON THE TRIAL COURT'S DISCRETION IS SUPERIOR TO CREATING A NEW PRIVILEGE

The Court has repeatedly declined to create strict rules limiting the admissibility of evidence and has instead relied on "discretionary controls in the hands of a wise and strong trial court." *Michelson v. United States,* 335 U.S. 469, 486 (1948). The Court should continue this approach and reject respondents' request to fashion a new evidentiary privilege.

The Court's reliance on the discretion of the trial court is illustrated in *United States v. Reynolds,* 345 U.S. 1 (1953). There, the government invoked the common law privilege against revealing military secrets to resist production of a report concerning a plane crash. The Court noted that the case arose in "a time of vigorous preparation for national defense," 345 U.S. at 10, and noted that *in camera* inspection of the report, "even by the judge alone, in chambers," could jeopardize national security. *Id.* Nonetheless, the Court held that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," 345 U.S. at 9-10, and held that the trial judge was required to balance the need for the document against the degree to which military secrets would be compromised by disclosure of the evidence. *Id.*

The Court has also deferred to the discretion of district judges in situations far less extreme than those involving military secrets. In *Roviaro v. United States,* 353 U.S. 53 (1957), in considering a challenge to assertion of the common law informer's privilege, the Court concluded that "no fixed rule is justifiable," and that the district court's task was to balance "public interest in protecting the flow of information against the individual's right to prepare his defense." *Id.* at 62. Similarly, in *United States v. Zolin,* 491 U.S. 554 (1989), the Court rejected an independent-evidence requirement for a litigant urging a crime-fraud exception to the attorney client privilege and held that the district court in its "sound discretion" could review *in camera* the assertedly privileged documents. *Id.* at 573.

The Court has repeatedly relied on the sound discretion of district judges in rejecting requests for new evidentiary privileges. In *Branzburg v. Hayes,* 408 U.S. 665 (1972), the Court rejected a request to create a newsgatherer's privilege, 408 U.S. at 689, relying instead on the power of district courts to control grand juries. *Id.* at 708. As Justice Powell explained in his concurring opinion:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional ways of adjudicating such questions.

408 U.S. at 710 (concurring opinion)

Following *Branzburg,* the Court refused to create an editorialist's privilege in *Herbert v. Lando,* 441 U.S. 153, 177 (1979). Again, the Court relied on the sound discretion of district courts "to exercise appropriate control over the discovery process." *Id.* at 177. More recently, the Court has relied on a district court's discretion in balancing a state's interest in maintaining the confidentiality of juvenile court records with a litigant's need for relevant evidence. *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987).

District courts are familiar with case by case balancing.[83] Moreover, this is the approach taken by the Second Circuit in *In re Doe,* 964 F.2d 1325, 1329 (2d Cir. 1992), and is precisely what is currently advocated by Professor Slovenko, an early advocate of an absolute psychotherapist privilege.[84] After considering the matter for more than thirty years, Professor Slovenko has concluded as follows:

> In all cases, civil or criminal, the test is relevancy. The confidentiality of a psychotherapist-patient communication is protected from disclosure only by showing that the communication is without relevance to the issues in the case or, as a general principle, when other evidence is available and is less onerous to obtain.
>
> Of course, what is relevant does not lend to an easy answer. It's a case-by-case decision to be made by the judge.

Slovenko, *Letter,* 151 Am. J. Psychiatry 626 (1994).

The Court should again refuse to create a new evidentiary privilege and continue to rely on district courts to exercise appropriate control over the discovery process to balance competing interests.

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[83] *See, e.g., Lora v. Board of Ed. of New York,* 74 F.R.D. 565 (E.D.N.Y. 1977).

[84] *See* Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 Wayne L. Rev. 175, 199 (1960)

H. THE RECORD IN THIS CASE EXEMPLIFIES THE CAREFUL EXERCISE OF DISCRETION

The district judge in this case carefully exercised his discretion in requiring respondent to answer questions about the "description of the episode, recollections of the episode" (Pet.App. 36) she had related to the social worker. To ensure that the "narrow inquiry" (Pet.App. 47) did not get out of hand, the court required that respondent Redmond's deposition be supervised by a magistrate judge. (Pet.App. 38-39.)

The district court again carefully exercised its discretion after respondent Redmond, having been ordered to testify, claimed an inability to recall what she had told the social worker about the facts of the shooting. In order to make an informed judgment, the district judge set the matter for an evidentiary hearing so that he could make credibility determinations about respondent Redmond's inability to recall. After hearing respondent's testimony, the district judge found that she was not being truthful and authorized a limited further inquiry, in which petitioner's attorneys could review the notes made by the social worker "which relate to the subject matter" of conversations (Pet.App. 58) and could depose the social worker about the content of conversations that were directly relevant to the lawsuit. (Pet.App. 57.)

The district court was again asked to exercise its discretion after the resumed deposition of the social worker produced evidence that respondent Redmond had not been truthful at her deposition. (App. 70-72.) The trial judge then ordered the social worker to produce her unredacted notes for inspection "for counsel's eyes only." (App. 73.)

The final exercise of the district court's discretion came when the social worker refused to produce her records without respondent Redmond's authorization, which respondent refused to provide. (App. 75.) After an evidentiary hearing, and without any request from respondents to submit the records for *in camera* inspection, the district court found "that there has been and continues to be a willful flouting of the Court's orders and authority, both by defendant MaryLu Redmond and by Karen Beyer, who is the employee and agent of the other defendant, the Village of Hoffman Estates." (Pet.App. 61) The district judge was initially inclined to preclude Redmond from testifying at trial. (Pet.App. 62.) Although the trial judge later modified this sanction to permit Redmond to testify, he instructed the jury about an adverse inference flowing from the non-production of the counseling records. (App. 83-90.)

The district court's rulings carefully protected respondent Redmond's privacy interests. Petitioner was not permitted to inquire about respondent's dreams (Pet.App. 49); the district judge limited inquiry into conversations with the social worker about the facts of the shooting. There should be little expectation of privacy when facts that will be at issue in a lawsuit are discussed with a social worker. *Cf. Couch v. United States,* 409 U.S. 322, 335 (1973) (no expectation of privacy in information disclosed to accountant for preparation of tax returns).

The only tool that was not used by the district court was an *in camera* review of the social worker's records. This vehicle, though, was rejected by respondent Redmond (App. 93) and the district judge viewed her claims of unfairness as someone "saying that she ought to cry for mercy because having killed her parents she's an orphan." (*Id.*)

The record in this case shows that respondents intentionally flouted the district court's discovery orders. The record also shows that the careful and patient exercise of discretion by a district judge to balance respondent Redmond's privacy interests with petitioner's need for relevant evidence. Here, it is plain that the new evidentiary privilege sought by respondents is unnecessary and unwarranted and should not be adopted by the Court.

CONCLUSION

It is therefore respectfully submitted that the decision of the Court of Appeals should be reversed and the case remanded with instructions to reinstate the judgment of the district court.

November, 1995

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ADDENDUM

Proposed Rule of Evidence 504

PSYCHOTHERAPIST-PATIENT PRIVILEGE

(a) *Definitions.*

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) *General Rule of Privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions*

(1) *Proceedings for Hospitalization.* There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by order of judge.* If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) *Condition an element of claim or defense.* There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

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No. 95-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator for RICKY ALLEN, SR.,

Petitioner,

v.

MARY LU REDMOND and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

I.

Whether the existence and scope of the psychotherapist/patient privilege recognized by the Seventh Circuit in this case comply with Rule 501 of the Federal Rules of Evidence?

II.

Whether the psychotherapist/patient privilege recognized by the Seventh Circuit under Rule 501 of the Federal Rules of Evidence should include confidential communications with clinical social workers rather than being limited to psychiatrists and clinical psychologists as provided in Proposed Rule of Evidence 504?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator
for RICKY ALLEN, SR.,
Petitioner,
v.

MARY LU REDMOND and VILLAGE OF
HOFFMAN ESTATES, ILLINOIS,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1-24) is reported at 51 F.3d 1346. The court of appeals' denial of the petition for rehearing and suggestion for rehearing en banc (Pet.App. 26) is unreported. The relevant oral rulings and memorandum opinion of the district court (Pet.App. 27-66) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1995. The petition for rehearing was denied on May 12, 1995. The petition for a writ of certiorari was filed on August 10, 1995 and granted on October 16, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves Rule 501, Federal Rules of Evidence, 28 U.S.C., which is set forth verbatim at Page 3 of the Brief for Petitioner.

STATEMENT

On June 27, 1991, Hoffman Estates police officer Mary Lu Redmond was dispatched to the Canyon Estates Apartment Complex regarding a reported fight in progress. Shortly after arriving there, the officer observed a group of men near the building entrance, one of whom was holding a pipe. She then saw two men run out of the building and onto the lawn. The second man, Ricky Allen Sr., was armed with a knife and was chasing, and gaining on, the other man. She shouted for him to drop the knife. Within seconds, when it appeared to her that Allen was about to stab the other individual, the officer shot and killed him.

The plaintiffs brought a three-count complaint contending that the officer had no lawful reason to shoot, since, in their view, Allen was unarmed and was not in any position of causing death or bodily harm to anyone else. Count I alleged that Redmond's actions violated the decedent's federal constitutional right not to be subjected to unreasonable seizures nor to be deprived of life without due process of law. Count II alleged that Redmond's actions were wilful and wanton, thereby entitling the decedent's next-of-kin to damages under Illinois' wrongful death statute. The last count alleged that Redmond deprived Ricky Allen's children of their federal constitutional right to associate with their father. (App. 8-12) Plaintiffs never amended their complaint. They abandoned their third claim at trial. (R. 167 at p. 665)

During the course of pretrial discovery, plaintiffs' attorney sought to discover the content of numerous conversations between Redmond and Karen Beyer, a licensed clinical social worker to whom Redmond went for counseling following the shooting. Beyer held the position of Director of Health and Human Services for the Village of Hoffman Estates. All of Officer Redmond's conversations with Karen Beyer after June 27, 1991 took place during these counseling sessions. (App. 18) The plaintiffs initially inquired directly of Redmond at her deposition regarding the content of the counseling sessions. The defendant refused, however, contending that any such communications were privileged. (R. 64, 65) Plaintiffs then directed a subpoena to Beyer to testify at deposition and to produce her curriculum vitae and "all notes, records, reports pertaining to Mary Lu Redmond." (R. 64, Exh. A) Defendants moved to quash the subpoena, contending, once again, that any conversations occurring within the context of the counseling relationship, as well as any corresponding records, notes, or reports, were privileged under both state and federal law. (App. 16-28) The district court denied defendants' motion. (R. 67, 119-1) The plaintiffs then moved for an order to compel Redmond to appear for a third deposition session to answer questions about her conversations with Beyer. (App. 31) Over defendant's objection (App. 33), the court granted plaintiffs' motion. (R. 73, 117-1) This followup deposition then proceeded in the presence of a magistrate judge on May 11, 1992. (R. 78)

On June 23, 1992, Karen Beyer, through her attorney, filed a motion for reconsideration of the district court's previous rulings on the privilege issue. (App. 36) The defendants orally joined in this motion. (R. 117-2 at p.6) After the court denied this motion (R. 82, 117-2), Beyer was deposed. Plaintiffs' counsel then brought a motion to compel Beyer to answer certain questions to which objections had been made and to produce certain notes and documents. (App. 62) On September 30, 1992, the court granted this motion. (R. 92) Plaintiffs next moved the court for sanctions against Redmond, contending that her deposition answers relating to her conversations with Beyer were evasive and incomplete. Specifically, the plaintiffs sought an order barring Officer Redmond from testifying at trial. (App. 64) On December 10, 1992, the court held an evidentiary hearing, at which Redmond testified. (R. 106, 119-2) The court ruled that plaintiffs' counsel would be given further opportunity to depose Beyer and to review her notes. (R. 119-2 at pp. 41-54) Following this second installment of Beyer's deposition on January 26, 1993, plaintiffs then filed a second motion to compel Karen Beyer to answer certain questions. Specifically, plaintiffs requested an order permitting unrestricted inquiry into statements made by Redmond to Beyer and requiring the production of all of Beyer's notes. (App. 70) The court granted this motion on February 5, 1993. (R. 112, App. 73-74)

Plaintiffs next filed a motion for sanctions against the defendant contending that she had instructed Beyer to refuse to comply with the court's February 5, 1993 order. (App. 75) An evidentiary hearing was held on March 8, 1993, at which both Redmond and Beyer testified. (R. 114, 119-4) After the parties submitted written briefs as requested by the court (R. 119-4 at pp. 49-51; R. 121-126, 128), Judge Shadur granted plaintiffs' motion on April 6, 1993, ordering that Officer Redmond would be precluded from testifying at trial regarding her version of the event "because plaintiffs' attorneys have been blocked from effective cross-examination." The court also referred the matter of Beyer's non-compliance to the U.S. Attorney's Office for possible criminal contempt proceedings. (R. 129, 130, 139) The case was then set to commence trial on December 13, 1993. (R. 136)

On December 8, 1993, defendants filed a motion to reconsider and to vacate the court's order barring Redmond from testifying at trial. (App. 77) By this time, there had been no finding of contempt entered by any judicial officer against Karen Beyer following the district court's referral order. (App. 80) On December 10, 1993, the court granted defendants' motion, but with the proviso that the jury would be informed that it could draw an inference that the records, notes, and documents which had not been produced by Beyer would have contained information unfavorable to the defendants. (R. 143; App. 83-90)

At trial, the plaintiffs called Redmond as a witness during their case-in-chief and, over the standing objection of the defendant, (App. 91-95) interrogated her with regard to her conversations with Beyer. (App. 100-109) Plaintiffs' counsel also called Beyer as a witness, and, once again over defendants' objection, examined her about the conversations as well as her notes and records. (App. 111-122)

At the jury instruction conference held on December 20, 1993, defendant objected to the court giving plaintiffs' instruction No. 8, which discounted Ms. Beyer's self-reference as a therapist, informed the jury that there is no legal justification to refuse to produce Ms. Beyer's notes of her conversations with Ms. Redmond, that such refusal was unjustified, and that they were, under the circumstances, entitled to presume that the contents of those notes would be unfavorable to both Redmond and to the Village. (R. 167 at pp. 630-636; Pet. App. 67, 68)

The jury returned its verdict on December 22, 1993, awarding the plaintiffs $45,000.00 on Count I (the federal constitutional violation) and $500,000.00 on Count II (the state wrongful death claim). Judgment was entered the same day.

On defendants' appeal, the Seventh Circuit, in agreement with the Second and Sixth, found that reason and experience compel recognition of a psychotherapist/patient privilege under Rule 501 of the Federal Rules of Evidence. The court noted that psychotherapists and patients share a unique relationship in which the patient's ability to communicate freely without fear of public disclosure is the key to successful treatment. (51 F.3d at 1355, 1356) The court found further justification for the privilege in its protection for an individual's right of privacy (Id. at 1356) and observed that experience with the privilege has been favorable, as evidenced by its widespread recognition in all fifty states. (Id. at 1356, 1357) The privilege extends to mental health care providers other than psychiatrists and psychologists, including licensed clinical social workers, since drawing a distinction between counseling provided by costly psychotherapists and that provided by more readily available social workers serves no discernible public purpose. (Id. at 1358, n. 19) Under the facts and circumstances of this case, the court determined that the interests served through recognition and application of the privilege outweighed any countervailing interests. (Id. at 1357) Accordingly, the Seventh Circuit held that the district court had erred in refusing to recognize that privilege and in requiring disclosure of the content of any of the counseling conversations between Officer Redmond and Karen Beyer. The court reversed and remanded the case for new trial.

SUMMARY OF ARGUMENT

The psychotherapist-patient privilege recognized by the Seventh Circuit fully comports with Rule 501 of the Federal Rules of Evidence. It is carefully delimited to protect confidential communications that are necessary for successful psychotherapeutic treatment. The privilege is neither absolute nor unqualified, but instead requires courts to determine whether, in the interests of justice, the evidentiary need for disclosure outweighs the patient's privacy interests and related, concomitant societal interests.

In recognizing the privilege, the Seventh Circuit adhered to this Court's view that Rule 501 was not intended by Congress to freeze the law of privilege, but rather to provide the courts with flexibility to develop rules of privilege based on reason and experience, a reading that is clearly consistent with the rule's language and history.

Mindful of its responsibility under the rule to look to reason and experience, the appeals court correctly observed that the privilege serves significant societal as well as individual interests, such as the need for privacy and confidentiality in the psychotherapist/patient relationship and the societal benefits derived from encouraging citizens, including law enforcement personnel, who are subject to psychological trauma to seek healing. The court took into consideration the ongoing evolution of the mental health care system and developments within its interrelated professional components. The court also noted that the privilege had gained widespread recognition under state law.

The Seventh Circuit carefully and thoughtfully balanced the interests involved and correctly concluded that where, as here, ample sources of relevant evidence already exist, the societal and individual interests served by honoring the confidential and private nature of the psychotherapist/patient relationship outweighed the public interest in securing every man's evidence.

ARGUMENT

I.

THE PSYCHOTHERAPIST/PATIENT PRIVILEGE AS DEFINED AND DELIMITED BY THE SEVENTH CIRCUIT FULLY COMPORTS WITH BOTH THE EXPRESS LANGUAGE OF AND CONGRESSIONAL INTENT BEHIND RULE 501.

A. The Contours Of The Privilege.

Consistent with its authority under Rule 501 of the Federal Rules of Evidence, the Seventh Circuit determined in this case that reason and experience justified the recognition and application of a psychotherapist-patient privilege. The court premised its holding upon sound policy considerations implicating important societal interests as well as individuals' concerns, and rights, of privacy. In this appeal, Petitioner requests this Court to undo a ruling that rests upon the principles of the common law, compelling reason, and the wisdom of experience. Given the bases and support for the Court of Appeals' ruling, this Court should decline Petitioner's invitation, and instead, affirm that ruling.

Central to an analysis of the legality of the privilege is an understanding and appreciation of its contours. Contrary to a recurrent theme of Petitioner's presentation, the Seventh Circuit's ruling was neither "absolute" (Pet. Br. 26) nor unjustifiably "broad." (Pet. Br. 11-13, 21-22, 25, 31) Instead, the court articulated certain parameters which firmly ground the privilege upon reason and experience and do no violence to the principles of the common law.

1. The psychotherapist/patient privilege protects only confidential communications, i.e. all the information learned by the therapist or counselor during treatment that is necessary for treatment.

Drawing upon the enlightened reasoning of the Sixth Circuit in *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983) and the thorough analysis provided in *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450 (1985), the Seventh Circuit specifically tied its recognition of both the existence and scope of a psychotherapist/patient privilege to the confidential communications attendant to the psychotherapeutic relationship. 51 F.3d at 1356, 1357 n. 18. These "communications" include any information gained by the psychotherapist during treatment, either verbally or through observation of the patient. "Confidential" communications are only those necessary for treatment. (98 Harv. L. Rev. at 1540-41; cf. Proposed Rule 504(a)(3), set forth in Petitioner's Addendum.) Inasmuch as Respondents did not argue that the privilege should preclude disclosure of Officer Redmond's identity as a patient or client of Karen Beyer, the court did not address that aspect. (See App. 16-28; cf. Soffin, *The Case for a Federal Psychotherapist-Patient Privilege that Protects Patient Identity*, 1985 Duke L. Rev. 1217.)

2. The privilege may be claimed by the patient and by the therapist on behalf and in the interest of the patient.

The court did not restrict the right to claim the privilege solely to the patient. Rather, it may be invoked by the therapist as well, provided the therapist's claim is made on behalf and in the interest of the patient. This feature naturally follows from the core of the privilege, which is to protect the confidential communications between the two. The court was guided by state law, namely the Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 *et seq.*, and in particular §110/10. *See* 51 F.3d 1346, 1357 (7th Cir. 1995). Though not specifically referenced by the court as such, its formulation also apparently squares with the language of Proposed Rule of Evidence 504(c).[1]

3. The privilege extends to mental health care workers including licensed clinical social workers engaged in psychotherapy.

Whereas the district court and the Petitioner have placed undue emphasis throughout this case on the title of the therapist involved,[2] the Court of Appeals did not succumb to this unwarranted restriction, noting that in today's world, professionals with quite a variety of job titles and descriptions provide mental health care to patients. The court maintained its focus upon the psychotherapeutic function as the foundation of the relationship,[3] and observed that drawing distinctions between counseling provided by costly psychotherapists and counseling provided by more readily accessible social workers serves no discernible purpose. 51 F.3d at 1358, n. 19.

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[1] For reasons which follow in this brief, Respondents do not concede nor advocate the Petitioner's argument that the privilege, if any, should be restricted only to psychiatrists and psychologists, as the text of 504 provides. (Pet. Br. 39) The present references to 504 simply illustrate that the appeals court's present ruling does not represent a radical undertaking.

[2] R. 119-1 (Transcript of Proceedings 3/26/92) at pp. 4-8, 11; Pet. App. 48, 49 (Ruling of 6/23/92); App. 92 (ruling on objection at trial); Pet. App. 67 (charge to jury).

4. The privilege is not absolute. It requires an assessment of whether, in the interests of justice, the evidentiary need for disclosure outweighs the patient's privacy interest.

Perhaps the most forceful rebuttal to Petitioner's urgings on the breadth of the privilege is the explicit requirement for balancing the evidentiary need for the disclosure of the contents of psychotherapy/counseling sessions against the patient's privacy interests. 51 F.3d at 1357. Here, the Seventh Circuit followed this Court's lead in *Trammel v. United States*, 445 U.S. 40 (1980): testimonial exclusionary rules and privileges must be ". . . accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " 445 U.S. at 50. The question is, ". . . whether the privilege . . . promotes sufficiently important interests to outweigh the need for probative evidence in the administration of . . . justice." 51 F.3d at 1357, citing *Trammel*, 445 U.S. at 52. The Appeals Court here carried out its balancing within the factual confines of the present case, and declined to speculate as to what other situations would call for abrogation of the privilege. 51 F.3d at 1357.

B. The Existence And Scope Of The Privilege Is Consistent With The Principles Of The Common Law.

To determine whether a psychotherapist/patient privilege can be reconciled with the meaning and intent of Rule 501, ordinary rules of statutory construction dictate that the language of the rule itself be examined first. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. ____, 113 S. Ct. 2786, 2793 (1993) ("We interpret the legislatively enacted Federal Rules of Evidence as we would any statute."); Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rules of Evidence 501: The Restrictive Thesis, The Expansive Antithesis, and the Contextual Synthesis*, 73 Neb. L. Rev. 511, 536 (1994) (hereinafter "Imwinkelried at ____"). Professor Imwinkelried's thorough analysis of the rule's text (Imwinkelried at 525-536) points out that Rule 501 uses the word "principles," not "rules" or "privileges." "Principles" normally denotes a proposition at a higher level of generality than a mere rule. The text of many other Federal Rules uses the expression "rules." Rule 501 itself includes the term "rule" elsewhere in its text. Congress' selection of the term "principles" presumably indicates that it meant something other than the common-law privilege rules in effect at the time of the adoption of the Federal Rules. When a legislature uses different terms, it is normally assumed that the legislature meant different things. It would have been a simple matter for the drafters of Rule 501 to state that federal privilege questions would be governed by "common-law rules" or "privileges recognized at common-law." Congress' ultimate choice of wording is, therefore, at odds with the notion that Congress intended to confine the courts to privileges which were settled fixtures at common law. Furthermore, the language of Rule 501 contains neither express prohibition against, nor express discouragement of, recognition of new privileges.[4] This contrasts with other evidentiary rules upon which Congress did engraft "explicit biases." (Imwinkelried at 528, 529)

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[3] Stroube, *The Psychotherapist-Patient Privilege: Are Some Patients More Privileged Than Others?*, 10 Pac. L. J. 801, 820 (1979).

Here, while the Petitioner has considered part of Professor Imwinkelried's presentation (Pet. Br. 17-19), she has studiously avoided discussion of this textual analysis. Petitioner's reliance upon cases from other circuits in suggesting that Rule 501 limits the courts to recognizing "only privileges that existed at common law" (Pet. Br. 20, n. 28; Pet. Writ 7, 8) is equally deficient, given the absence of any meaningful analysis of the Rule's language in those reported decisions.[5]

Also contrary to Petitioner's view, the legislative history of Rule 501 amply supports the connection between the privilege and "the principles of the common law." In fashioning the proposed rules to be forwarded to the Congress, the Judicial Conference's Advisory Committee had observed that the common law had ". . . indicated a disposition to recognize a psychotherapist-patient privilege . . . when legislatures began moving into the field." *Communication from the Chief Justice of the United States Transmitting the Proposed Rules of Evidence of the United States Courts and Magistrates*, H.R. Doc. No. 46, 93d Cong., 1st Sess., at 83 (1973). Upon reaching Congress, the proposed rules were submitted to the Special Committee on Reform of Federal Criminal Laws of the House Judiciary Committee, chaired by Representative Hungate. (Imwinkelried at 519, 520.) The Committee deleted the specific privilege proposals contained in Rules 502-513, which included a psychotherapist/patient provision (Rule 504), and substantially modified Rule 501, thereby prompting the chairman's remark, referenced in Petitioner's Brief, at p. 16, that ". . . The House rule on privilege is intended to leave the Federal law of privilege where we found it." Petitioner has overlooked, however, the chairman's comments immediately following:

> ". . . The federal courts are to develop the law of privilege on a case-by-case basis.
>
> "Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase 'governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience,' is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis. For example, the Supreme Court's rules of evidence contained no rule of privilege for a newspaperperson. The language of Rule 501 permits the courts to develop a privilege for newspaper-people on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to

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[4] Correspondingly, Rule 501 does not expressly prohibit or discourage the modification of longstanding rules. In *Trammel*, for example, this Court modified the witness-spouse privilege, despite its common law origins and lengthy history. 445 U.S. 40, 43-53.

[5] *See Slaken v. Porter*, 737 F.2d 368, 377 (4th Cir. 1984); *United States v. Moore*, 970 F.2d 48, 50 (5th Cir. 1992); *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989); *United States v. Burtrum*, 17 F.3d 1299, 1301-02 (10th Cir. 1994); *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992).

> newspeople any protection they may have from State newsperson's privilege laws."

Proposed Rules of Evidence: Presentation of the Conference Report on H.R. 5463, 120 Cong. Rec. H. 12,253 (1974), *reprinted in* 1984 U.S.C.C.A.N., 7051, 7110. Noted witnesses urged Congress to authorize the courts to use the common law evolutionary method to develop privilege doctrine. Professor Louisell, for example, wrote: ". . . The law of privilege seems especially to profit from the common law evolutionary method, wise solution of specific problems being uniquely dependent on facts . . ." Professor Black commented: ". . . I think your deletion of all the specific Rules, coupled with the addition of your general Rule (as Rule 501) will conduce to the wisest possible development of the subject for the time being. You leave it entirely open to the Supreme Court to develop the law of privilege from time to time in conformity to its judgment as to the requirements of the law of privacy, that is now a part of recognized constitutional law. Even more important, perhaps, you allow the court (and the lower courts) to develop privilege rules appropriately recognizing the great value of human privacy . . ." *Proposed Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., at 192, 242 (1973). The ensuing House Report commented that ". . . *privileges shall continue to be developed* by the courts of the United States . . ." *Proposed Rules of Evidence: House Report No. 650*, 120 Cong. Rec. H. 12,253, at 7082 (1973), *reprinted in* 1984 U.S.C.C.A.N. 7051, 7082.

The Senate Judiciary Committee noted its agreement with the House's action ("The committee agrees with the main thrust of the House amendment that a federally developed common law based on *modern* reason and experience shall apply . . .") (emphasis added), and, in response to specific concerns raised over the deletion of Rule 504, declared:

> "It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient . . . or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case by case basis."

Proposed Rules of Evidence, S. Rep. No. 1277, 93d Cong. 2d Sess. (1974) *reprinted in* 1984 U.S.C.C.A.N. 7051, 7058, 7059.

Thus, the legislative history clearly indicates that Congress' use of the term "principles of the common law" in Rule 501 was not intended to refer to a static set of common-law privilege rules, but rather to a dynamic methodology that the courts could use to evolve privilege doctrine, including that pertinent to the psychotherapist-patient realm. (Imwinkelried at 526.)

This Court has declared that, ". . . In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege in a case-by-case basis' . . . and to leave the door open to change." *Trammel*, 445 U.S. at 47; *see also United States v. Gillock*, 445 U.S. 360, 367 (1980); *United States v. Weber*, 465 U.S. 799, 104 S. Ct. 1488, 1495 n. 25 (1984). While, as Petitioner has pointed out, this Court has declined to recognize certain other privileges in other contexts and which touch upon interests not implicated here, most notably the administration of criminal justice, the Court only did so after judging each asserted claim to privilege on its facts and striking a proper balance between the interests there involved. *Branzburg v. Hayes*, 408 U.S. 632, 92 S. Ct. 2646, 2671 (1972) (Powell J., concurring).

Based upon the foregoing, the Seventh Circuit's recognition of a psychotherapist/patient privilege is firmly rooted in the ongoing evolutionary nature of the common law, as required by Rule 501. Neither the language nor the intent of the rule evidence any directive from the Congress to the courts to confine themselves solely to pre-1970s reason and experience in addressing privilege issues in the 1990s and beyond.

C. Reason And Experience Compel Recognition Of The Privilege.

1. The privilege serves important societal interests.

Society has an interest in promoting and maintaining the mental health and high functioning of its citizenry. There is widespread concern over joblessness and homelessness, impairment of productivity of workers, and the social and economic costs of mental and emotional disturbance or lack of well being. Violence and crime, as the court specifically noted (51 F.3d at 1355, n. 16), have become all too prevalent, leaving in their wake countless victims who either directly or indirectly bear the psychological and emotional consequences. Individuals such as these need and deserve the help, support, and emotional release provided by counseling and psychotherapy. The inability to obtain effective psychotherapeutic treatment may preclude the enjoyment and exercise of many fundamental freedoms. Mental illness may prevent one from understanding religious and political ideas, or interfere with the ability to communicate ideas. Some level of mental health is necessary to be able to form belief and value systems and to engage in rational thought. *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983), *citing* Smith, *Constitutional Privacy in Psychotherapy*, 49 Geo. Wash. L. Rev. 127 (1980). The interest of the patient in exercising his rights is also society's interest, for society benefits from its members' active enjoyment of their freedom. Moreover, society has an interest in successful treatment of mental illness because of the possibility that a mentally ill person will pose a danger to the community. *Zuniga*, 714 F.2d at 639. Accordingly, society has an interest in encouraging its members to seek qualified mental therapy when necessary. *See* Comment, *Evidence: The Psychotherapist-Patient Privilege Under Federal Rule of Evidence 501*, 23 Washburn L.J. 706, 712 (1984).

The present case suggests a more particularized, though correlating, societal interest in promoting and maintaining the mental health and functioning of its law enforcement officers. A major hazard involved in being a police officer is the possibility of being involved in traumatic or critical incidents, incidents in which human lives are lost and/or serious injuries are witnessed. Involvement in such episodes is highly stressful. It is not simply that stress symptoms occur but that they may appear with a long time delay. Specific symptoms include guilt, anxiety, depression, sleep disturbances, flashbacks, and excessive anger. The effects of these stress symptoms can be devastating, both at a personal and a professional level. *See* Bohl, *The Effectiveness of Brief Psychological Interventions in Police Officers After Critical*

Incidents, in Critical Incidents in Policing, Revised, 31 (Reese, Horn, & Dunning, eds., 1991) (hereinafter "*Critical Incidents*"); Ostrov, *Critical Incident Psychological Casualties Among Police Officers: A Clinical Review*, *Critical Incidents*, 251. Any situation that reminds an officer of his/her own limits and that overwhelms his/her ability to cope with that insight can be traumatic. It brings home to an officer the fact that he is not in total control of every situation, and reminds an officer that he is not invulnerable. McMains, *The Management and Treatment of Postshooting Trauma: Administration and Programs*, *Critical Incidents*, 191.

The police officer's plight is further complicated by disparities between training and actual job duties. It has been estimated that police officers spend 75-90% of their duty time in noncrime-related activities. Among them are mediating interpersonal conflicts and functioning as helping persons. Only 10-20% of their duty time is crime-related. However, 90% of their training in law enforcement deals with crime work. Even though only 10% or less of their training focuses on service-related tasks, that occupies 75-90% of their duty time, bringing them into constant contact with an oftentimes unsympathetic public:

> "The image of the "cop" is not created exclusively by the officer (Undercuffler, 1980). An identity is assigned to them the moment they pin on the badge. That image may be a stereotype, outdated, and inaccurate; nevertheless, it is the one the public has of law enforcement officers and believes. Police officers do not have to accept it. They can, instead, change it or even develop their own and live by that more realistic one. Police officers are told, and end up accepting, that they are marriage counselors and should investigate and resolve successfully family conflicts, and help the couple resolve the conflict and "live happily ever after." They are supposed to be paramedics and save the dying. They are supposed to be super sleuths and solve all cases. Although they can see how absurd those expectations are, they frequently run the risk of ending up believing them. If they are supposed to do all these things and do them well, is it surprising that they insist that they need no help when they have personal problems; that they can manage by themselves? Yet, no matter how successful they are at any or all of the above, they frequently find themselves in the no-win situation of someone always disapproving of what they are, do, or say.
>
> "New police officers soon discover that many people seem to react to them negatively in an almost automatic manner. The person wearing the uniform or behind the badge is not seen as an individual but rather as an amalgam of symbols. . . The reasons behind these reactions to the uniformed officers include political, interpersonal, ethnic, racial, and socioeconomic factors as well as past experiences with other members of the police and exposure to the media, which has portrayed officers from the saviors of mankind to corrupt and evil members of society. Further, the officers are seen as the immediate representation of incarnation of the broader law enforcement system as well as of the criminal justice one. They can and are associated inevitably with the weakness of the system and criticized for it."

Silva, *The Delivery of Mental Health Services to Law Enforcement Officers, Critical Incidents*, 335, 338. With these discrepancies and contradictions, with the double messages, and with the undermining of authority and self-image, it can be understood why police work is one of the ten most stressful occupations in the world, and why the possibility of burnout is highly significant and the help of mental health professionals is essential. Silva at 338.

A mentally healthy, stable police force is a prime asset of a community. Encouraging officers to seek qualified professional help when needed contributes to preservation of that asset and elimination of the liability inevitably resulting from inattention to officer stress, anxiety, anger, and depression. Such encouragement fosters the important societal goal of preventing civil rights abuses and other unlawful, tortious misconduct at the hands of over-stressed, anxiety-ridden or otherwise troubled law enforcement personnel.

Since these societal interests are left unserved by the absence of or impediments to effective psychotherapeutic treatment, society has a concomitant interest in promoting the availability and effectiveness of psychotherapy, which is the treatment of mental and emotional disorders through the use of psychological techniques designed to encourage communication of conflicts and insight into problems, with the goal being personality growth and behavior modification. *American Heritage Dictionary*, 1463 (3d ed. 1992). This interest would itself be served through recognition of the privilege. *United States v. D.F.*, 857 F. Supp. 1311, 1320 (D.C. Wis. 1994). The psychotherapist's capacity to help her patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult, if not impossible, for her to function without being able to assure her patients of confidentiality and, indeed, privileged communication. *Zuniga*, 714 F.2d at 638. The very essence of psychotherapy is confidential personal revelations about

matters which the patient is and should be normally reluctant to discuss. The process involves a prying into the most hidden aspects of personality, a prying which discloses matters theretofore unknown even to the conscious mind of the patient. Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 184-85 (1960). In psychotherapy, the patient reports whatever goes through her mind. She is required to say everything that comes into consciousness, no matter how ridiculous or inappropriate it may sound. Such communications often involve highly personal matters, the disclosure of which would frequently be embarrassing to the point of mortification. *Jaffee*, 51 F.3d at 1356, *citing In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992). Nonetheless, therapy demands that the patient talk about everything and anything that occurs to her, without restraint and without any attempt to produce a logical, meaningful discourse. Slovenko at 186. Consequently, what the therapist hears is not a simple recitation of facts relating to an incident or series of incidents, but a commingling of fact, feelings, fears, and fantasies.

There is a danger of misinterpretation and erroneous conclusion if such statements are simply accepted at face value. Dunning points out, for example, that in police critical incident responses, guilt is a common factor. It would not be unusual for the officer to blame himself or herself for the outcome of the event. "If only . . ." and "I should have . . ." are frequently expressed comments after a traumatic incident. Rather than being construed as survivor's guilt, a mental injury, others may accept such statements as admissions of wrongdoing. Dunning, *Mitigating the Impact of Work Trauma: Administrative Issues Concerning Intervention, Critical Incidents*, 73, 77.

If the therapist takes notes or generates records relating to these communications, these may contain not only a patient's actions and statements, but also impressions of a patient which the therapist gains during interviews or therapy sessions, tentative conclusions which the therapist draws, and techniques which he feels might be advisable in the future. While these may be nothing more than working aids to assist the therapist in serving the patient, the layman, i.e. juror, upon reading these materials or hearing them recited may well conclude that they represent final conclusion and uncontroverted facts. *See* Note, *The Social Worker-Client Relationship and Privileged Communications*, 1965 Wash. U. L.Q. 362, 383 (1965).

For therapy to succeed, there must be trust between patient and therapist. The patient's communications to the therapist originate in a confidence that they will not be divulged. McGuire, Graves, & Glaw, *Depth of Self-Disclosure As A Function of Assured Confidentiality and Videotape Recording*, 64 J. Counseling & Development 259, 262 (1985). The inviolability of that confidence is essential to achievement of the purpose of the relationship. Slovenko, at 186. In the absence of that trust, patients will not disclose information necessary for treatment. Empirical studies have suggested that laws that limit the privacy of particular types of "confessions" may discourage certain patients from being candid in the first place, (*See* Taub & Elwork, *Researching the Effects of Confidentiality Law on Patient's Self-Disclosures*, 21 Prof. Psych.: Res. & Prac. 72, 74 (1990)), and that clients' understandings of the limits of confidentiality may influence their willingness to self-disclose regarding behaviors or experiences considered serious or extreme; once informed that there are limits to the confidentiality of the therapeutic relationship, clients may engage in less self-disclosure. Nowell & Spruill, *If It's Not Absolutely Confidential, Will Information Be Disclosed?*, 24 Prof. Psych.: Res. & Prac. 367, 369 (1993). Lower courts have taken note. In *Jennings v. D.H.K. Airlines*, 101 F.R.D. 549, 550-551 (N.D. Ill. 1984), for example, District Judge Marshall acknowledged, ". . . Had (the plaintiff) known that (the psychologist) might be required to disclose her confidences in a lawsuit . . . her trust in (the psychologist) doubtless would have diminished."

The need for this inviolable trust is especially pronounced in the case of law enforcement personnel steeped in a culture that creates a "suspiciousness and distrust characteristic" (*See* Fuller, *An Overview of the Process of Peer Support Team Development*, *Critical Incidents*, 99, 101) and includes, all too often, administrative non-responsiveness to psychological injury:

> ". . . Most administrators are wary of any discussion that suggests job-related duties and conditions might produce psychological injury to workers. The protective services have generally believed that their selection and training process produces individuals who can adapt well under stressful conditions, and in fact, that stress can bring out the best in a worker. . . Manifestation of injuries are viewed as an individual responsibility, not one that relates to the supervision of personnel deployed in a special operation. Where bulletproof vests are universally regarded as preventive safety equipment and firearms certification as preventive training against the possible injury of a bullet wound during the performance of duty, no thought or planning is generally afforded mental injuries that might result from the incident. Yet such

> injuries are just as much the result of the shooting event as any flesh wound."

Dunning, *Mitigating the Impact of Work Trauma: Administrative Issues Concerning Intervention, Critical Incidents* 73, 74-75.

2. The privilege protects an individual's right of privacy.

An individual's right of privacy has been characterized as a ". . . fundamental tenet of the American legal tradition . . . ," protected by common law, statutory provisions, and the Constitution. 98 Harv. L. Rev., *supra*, at 1544.[6] This Court has recognized that an individual's interest in privacy includes an interest in controlling the dissemination of private information about himself/herself. Communications made by patients to psychotherapists implicate this privacy concern. The Constitution also recognizes the general interest of individuals in the privacy of confidential communications. The test is whether an individual justifiably relied on an "expectation of privacy." The patient-psychotherapist relationship meets that test, since psychotherapy requires that patients fully disclose extremely personal and sensitive information. Compelled disclosure of information communicated by a patient to a psychotherapist will therefore often threaten the privacy of the patient's most intimate thoughts. 98 Harv. L. Rev., *supra* at 1545-1547.

The psychotherapist-patient relationship has been compared more readily with that between priests (and other clerics) and penitents than doctors and patients. It is, by its nature, more intimate, personal, and private than the physician-patient relationship; patients will seek medical treatment even if there is a risk of disclosure since there is little chance of stigmatization in being treated by a general practitioner. Domb, *I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J. L. & Health 209, 214 (1990); *See also* Comment, 23 Washburn L.J., 706, *supra*, at 708. On the other hand, self disclosures made to psychotherapists share common characteristics with confidential communications uttered within the confessional or spoken to a rabbi or minister. This was obviously the view of the Judicial Conference in proposing Rules 504 and 506. The Advisory Committee specifically noted that the definition of "confidential" communication in Rule 506(a) coincided with the use of the term in Rule 504 (a)(3), explaining that, ". . . Many clergymen now receive training in marriage counseling and the handling of personality problems. Matters of this kind fall readily into the realm of the spirit. The same considerations which underlie the psychotherapist-patient privilege of Rule 504 suggest a broad application of the privilege for communications to clergymen." 26 Wright & Graham, *Fed. Prac. & Proc.: Evid.* at 9-10 (1992) (the Advisory Committee's Notes are reproduced in their entirety).

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[6] In addition to the authorities discussed in the article, eight states include references to a right of privacy in their respective constitutions: Alaska Const. Art. I, §22, Ariz. Const. Art. II, §8, Cal. Const. Art. I, §1, Fla. Const. Art. I, §23, Haw. Const. Art. I, §7, Ill. Const. Art. I, §§6, 12, La. Const. Art. I, §5, Mont. Const. Art. II, §10. Wisconsin's Constitution mandates that the state shall treat crime victims with respect for their privacy. (Art. I, §9m.) These and other states also provide statutorily for a right of privacy, either in general (Wis. Stat. Ann. §895.50) or in specific contexts (Neb. Rev. Stat. §81-673, Me. Rev. Stat. Ann. tit. 34-B, §3003 (healthcare/mental health); Okla. Stat. 21, §839.1, N.Y. Civ. Rights Law §50, Neb. Rev. Stat. §20-202 (use of name or picture without consent); Me. Rev. Stat. Ann. tit. 17-A, §§432, 483 (computer privacy); Minn. Stat. Ann. §198.33 (residents of veterans homes, searches and seizures); Ala. Code §13A-11-30, et seq., Me. Rev. Stat. Ann. tit. 17-A, §511, S.D. Codified Laws §22-21-1, Utah Code Ann. §76-9-401 et seq. (eavesdropping and communications)).

Just as a penitent's privacy is protected in confessing his sins and transgressions and seeking spiritual healing, a patient's privacy in laying bare his entire self, his dreams, his fantasies, his sins, and his shame (*See Zuniga*, 714 F.2d at 638) in quest of healing through psychotherapeutic treatment is likewise entitled to protection.

Contrary to Petitioner's suggestion, there is no inherent bias favoring defendants in civil litigation who seek protection of their privacy through claim of privilege. (*See* Pet. Br. at 38, 39 (". . . it is better to preserve this . . . remedy than provide secret counseling for those who . . . have violated the Constitution.")) Instead, as *Jennings v. D.H.K. Airlines*, *supra*, demonstrates, plaintiffs likewise need, and would be entitled, to protect their privacy in this manner as well. 101 F.R.D. at 550, 551.

3. Experience with the privilege has been favorable.

All fifty states have recognized the need for and have adopted varying forms of the psychotherapist-patient

privilege. 51 F.3d at 1356.[7] This widespread recognition of the privilege at the state level is strong evidence that experience with the privilege has been favorable. *Id.* at 1357, citing *In re Doe*, 964 F.2d at 1328. This Court has taken note of state privilege laws in determining whether to extend a privilege in light of reason and experience in the federal system. *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980); *Trammel v. United States*, 445 U.S. 40, 48-50 (1980). A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy. *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981).

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[7] Ala. Code §34-26-2; Alaska Stat. §8.86.200; Ariz. Rev. Stat. §32-3283; Ark. Code Ann. §17-39-107; Cal. Bus. & Prof. Code §1012; Colo. Rev. Stat. §13-90-107; Conn. Gen. Stat. Ann. §52-146q; Del. Code Ann. Title 24 §3913; D.C. Code §14-307; Fla. Stat. Ann. §90.503; Ga. Code Ann. §24-9-21; Haw. Rule 504.1; Idaho Code §54-3213; Idaho Evid. Code §9-203; Ill. 225 ILCS 20/16; Ind. Code §25-23.6-6-1; Iowa Code §622.10; Kan. Stat. Ann. §65-6315; Ky. Rule of Evid. 507; La. Code of Evid. 510; Me. Rev. Stat. Ann. tit. 32, §7005; Md. Code Ann. §9-121; Mass. Gen. Laws Ann. ch 112 §135A; Mich. Stat. Ann. §18.425(1610); Minn. Stat. Ann. §595.02(g); Miss. Code Ann. §73-53-29; Mo. Ann. Stat. §337.636; Mont. Code Ann. §37-22-401; Neb. Rev. Stat. §71-1,335; Nev. Rev. Stat. §49.215, 225, 235; N.H. Rev. Stat. Ann. §330-A:19; N.J. Rev. Stat. §45:15BB-13; N.M. Stat. Ann. §61-31-24; N.Y. Evid. Code §4508; N.C. Gen. Stat. §8-53.7; N.D. Evid. Code §503; Ohio Rev. Code Ann. §2317.02; Okla. Stat. 59 §1261.6; Or. Evid. Code §40.250; Pa. Cons. Stat. tit. 23 §6116; tit. 42 §5945.1; R.I. Gen. Laws §5-37.3-3, 4; S.C. Code Ann. §19-11-95; S.D. Codified Laws §36-26-30; Tenn. Code. Ann. §63-11-213; Tex. Rules Civ. Evid. 510; Utah Code Ann. §58-60-114; Vt. Rule Evid. 503; Va. Code Ann. §8.01-400.2; Wash. Rev. Code §18.19.180; W. Va. Code §30-30-12; Wis. Stat. §905.04; Wyo. Stat. §33-27-123.

While it is true, as Petitioner has pointed out, (Pet. Br. 31-38) that state statutory provisions allow for exceptions, this is no justification to avoid recognition of an appropriate rule when, as here, compelling reasons warrant application of the rule. Proposed Rule 504, which Petitioner proffers as her preferred alternative, itself contained exceptions in subpart (d). Furthermore, given the balancing that is required under the privilege rule at bar, the court has preserved the ability and responsibility of the lower courts to deal appropriately, in the interests of justice, with exceptional situations.

4. Clinical social workers are psychotherapists. There is no rationale today for excluding their patients from the protection of the psychotherapist-patient privilege.

Petitioner's argument regarding "appropriate limits" that would exclude clinical social workers from coverage (Pet. Br. 39, 40) is not realistic. It totally ignores the developments that have occurred within the interrelated mental health care professions and the delivery of mental health services over the past two decades. When proposed Rule 504 was developed in the early 1970's, the social work profession was in its early adolescence. Social work was largely generic—all social workers were trained to perform functions such as casework, group work, community organization, and administration. Although trained as caseworkers, only few social workers were trained as psychotherapists. Clinical social work was in its infancy and not even recognized as a separate specialty within the profession. Psychotherapy was not

considered a function of social work. Only eleven states licensed or certified social workers.[8]

Since that time, however, the role of clinical social workers has developed as their training and functioning have expanded. Today, the greatest proportion of psychotherapeutic services are delivered by clinical social workers working in every type of mental healthcare facility and in private practice. Clinical social workers are the predominant providers of mental health services in facilities serving the underprivileged and in rural areas. (*See* Brief Amici Curiae of the National Association of Social Workers *et al.*, pp. 5-7, and authorities cited therein.) Their training and education have evolved to include in-depth study of cognitive, psychological, and social development and major theoretical explanations of personality development. *Id.*, at p. 11; *see also*: 98 Harv. L. Rev., *supra*, at 1550. All fifty states, as well as Puerto Rico and the Virgin Islands, have some form of regulation of clinical social work practice.[9] Illinois law, for example, defines clinical social work practice as ". . . the providing of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders in individuals, families, and groups based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress." An individual cannot obtain a license to practice clinical social work until he or she passes an examination and has completed either (a) a master's degree in social work and 3,000 hours of satisfactory supervised clinical experience, or (b) a doctoral degree in social work and 2,000 hours of satisfactory supervised clinical experience. 225 ILCS 20/3, 20/9.

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[8] Cal. Bus. & Prof. Code, §4990 *et seq.*; Ill. Rev. Stat. Ann. ch. 225, para 20/1 *et seq.* (Illinois); La. Rev. Stat. Ann. §37:2701 *et seq.*; Me. Rev. Stat. Ann. tit. 32 §7001 *et seq.*; Mich. Stat. Ann. §18.425 (1601); N.Y. Educ. Law §7700 *et seq.*; Okla. Stat. 59 §1250 *et seq.*; R.I. Gen. Laws 5-39.1-2; S.C. Code Ann. §40-63-10; Utah Code Ann. §58-60-201 *et seq.*; Va. Code Ann. §54.1-3700 *et seq.*

[9] See n. 8, *supra*; Ala. Code §34-30-1 *et seq.*; Alaska Stat. §.08.95.010; Ariz. Rev. Stat. 32-3291 *et seq.*; Ark. Code Ann. §17-39-101 *et seq.*; Colo. Rev. Stat. §12-43-401 *et seq.*; Conn. Gen. Stat. Ann., §20-195m *et seq.*; Del. Code Ann. tit. 24 §3901 *et seq.*; D.C. Code Ann. §2-3308.1 *et seq.*; Fla. Stat. Ann. § 491.002 *et seq.*; Ga. Code Ann. §43-10A-1 *et seq.*; Haw. Rev. Stat. §467 D-1 *et seq.*, 467 E-1 *et seq.*; Idaho Code §54-3201 *et seq.*; Ind. Code §25-23.6-1-1 *et seq.*; Iowa Code Ann. §154C.1 *et seq.*; Kan. Stat. Ann. §65-6301 *et seq.*; Ky. Rev. Stat. Ann. (continued...)

The increased role of clinical social workers is likewise reflected in Congressional action. Licensed or certified social workers are recognized as "licensed health professionals" under 42 U.S.C. §1395i-3(b)(5)(G) and 42 U.S.C. §1396r(b)(5)(G). Clinical social worker services are included within the term "medical and other health services" under 42 U.S.C. §1395x(s)(2)(N), are defined under 42 U.S.C. §1395x(hh)(2) as ". . . services performed by a clinical social worker . . . for the diagnosis and treatment of mental illnesses . . . which the clinical social worker is legally authorized to perform under State law . . . of the State in which such services are performed as would otherwise be covered if furnished by a physician or as incident to a physician's service," and are included under 42 U.S.C. §1395l(a)(1)(F) among those services reimbursable from the Federal Supplementary Medical Insurance Trust Fund.

Hence, Petitioner's argument that any privilege extending to patients of licensed or certified clinical social workers is per se overbroad lacks merit. To alleviate any concern whether a particular therapist or counselor is a bona fide mental health care provider, courts may look to the possession of educational degrees, licenses, minimum number of hours of training, or affiliation with a licensed institution. *See* 98 Harv. L.Rev., *supra*, at 1551; *See also*, Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Cal. L. Rev. 1050, 1058, (1973). Congress used this approach.[10] The Adviso-

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[9] (...continued)
§335.010 *et seq.*; Md. Code Ann. Health Occ. §19-101 *et seq.*; Mass. Gen. Laws Ann. ch. 112 §130 *et seq.*; Minn. Stat. Ann. §148B.01 *et seq.*; Miss. Code Ann. §73-53-1 *et seq.*; Mo. Ann. Stat. §337.600 *et seq.*; Mont. Code Ann. 37-22-101 *et seq.*; Neb. Rev. Stat. §71-1, 295 *et seq.*; Nev. Rev. Stat. §641B.010 *et seq.*; N.H. Rev. Stat. Ann. §330-A:1 *et seq.*; N.J. Rev. Stat. §45:15BB-1 *et seq.*; N.M. Stat. Ann. §61-31-1 *et seq.*; N.C. Gen. Stat. §90B-1 *et seq.*; N.D. Cent. Code §43-41-01 *et seq.*; Ohio Rev. Code Ann. §4757.01 *et seq.*; Or. Rev. Stat. Ann. §675.510 *et seq.*; Pa. Stat. Ann. tit. 63, §1901 *et seq.*; S.D. Codified Laws §36-26-1; Tenn. Code Ann. §63-23-101 *et seq.*; Tex. Hum. Res. Code Ann. §50-001 *et seq.*; Vt. Stat. Ann. tit. 26, §3201; Wash. Rev. Code 18.19.010 *et seq.*; W. Va. Code §30-30-1 *et seq.*; Wis. Stat. §457.01 *et seq.*; Wyo. Stat. §33-38-101 *et seq.*; P.R. Laws Ann. tit. 20, §821 *et seq.*; V.I. Code Ann. tit. 27, §531 *et seq.*

[10] 38 U.S.C. §7402(b)(9) (To be eligible to be appointed a social worker position under the Veteran's Health and Administration Act, person must hold a master's degree in social work from an approved college or university, and satisfy the social work license, certification, or registration requirements, if any, of the State in which the social worker is to be employed.) *See also* 42 U.S.C. §1395x(hh)(1) ("Clinical social worker" possesses a master's or doctor's degree in social work, has performed two years of supervised clinical work, is licensed or certified by the
(continued...)

ry Committee had used a similar approach in formulating the definition of "psychotherapist" in proposed Rule 504(a)(2)(B). (". . . a person licensed or certified . . . under the laws of any state or nation, while similarly engaged.") Courts may also consider whether the particular health care provider's profession utilizes internal controls and ethical rules, as in the case of clinical social workers. (*See* Brief Amici Curiae of the National Association of Social Workers, *supra*, at 13. *See also*: Note, 1965 Wash. U. L.Q., *supra*, at 382.)

Furthermore, refusal to include communications with mental health providers such as clinical social workers within the protection of the privilege would result in unequal protection of the law for persons who require psychotherapy and cannot afford to hire a psychologist or psychiatrist. Wealthy persons have the luxury of choosing any therapist they wish, regardless of discipline. Many others, however, including those who are dependent upon community health centers or employee assistance programs, have little or no choice. Psychotherapy treatment may be provided by psychiatrists, psychologists, or clinical social workers. The patient's need for psychotherapy, and his or her disclosures in psychotherapy, will be identical irrespective of the discipline of the therapist. To declare a privilege for those people who can afford psychiatrists and psychologists, and refuse one for those who must obtain treatment from other mental health care providers such as clinical social workers,

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[10] (...continued)
State in which services are performed or, if no licensure or certification is provided, has completed two years or 3,000 hours of post-master's degree supervised clinical practice.)

would deprive the poor or less-wealthy of a legal protection available to those who could afford to pay for it. 98 Harv. L. Rev., *supra*, at 1551; 10 Pac. L.J., *supra*, at 818; 61 Cal. L. Rev., *supra*, at 1061.

II.

THE SEVENTH CIRCUIT CORRECTLY APPLIED THE PRIVILEGE UNDER THE FACTS AND CIRCUMSTANCES OF THE PRESENT CASE.

It is undisputed that Karen Beyer was at all relevant times a licensed clinical social worker in the State of Illinois and a certified employee assistance counselor. (App. 18) She received her master's degree in social work from Loyola University of Chicago. In addition, she is a graduate of the two-year Family Therapy Training Program of the Family Institute of Northwestern University. As of mid-1992, she had had twelve thousand hours of experience in individual, family, and marital psychotherapy, and she provided clinical supervision in psychotherapy for doctoral psychology students from six graduate psychology programs. (App. 41, 42); 51 F.3d at 1350, n. 3. The only conversations or contact she had with Officer Redmond since June 27, 1991 were in her professional capacity through the Employee Wellness Program of the Village of Hoffman Estates, providing confidential psychotherapeutic counseling services to the officer. (App. 18, 36)

Though Petitioner urges that "crucial evidence would be excluded" by extending the psychotherapist-patient privilege to these confidential communications (Pet. Br. 21), the Seventh Circuit correctly determined that the evidentiary need to disclose the content of those post-shooting counseling sessions and Beyer's notes and records was vastly outweighed by the officer's privacy interests.

The federal issue posed by this case is whether Officer Redmond's use of deadly force under the facts and circumstances was objectively reasonable. (App. 8, 9) In *Graham v. Connor*, 490 U.S. 386 (1989), this Court explained that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, making allowance for the fact that police officers may be forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary. The "reasonableness" inquiry is conducted without regard to underlying intent or motivation. Evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force, nor would an officer's good intentions make an objectively unreasonable use of force constitutional. 490 U.S. at 396, 397.

Here, the officer never interjected her own state of mind as an issue into the case. Petitioner, however, relentlessly pursued state-of-mind issues. For example, Petitioner insisted on inquiring into "a relationship problem" which, according to Beyer's compelled deposition testimony, Officer Redmond mentioned during counseling. (App. 70, 71.) Assuming arguendo there was some "relationship problem" in Redmond's life, the objective reasonableness test of *Graham* excludes consideration of any such underlying motivation for her actions. Petitioner continuously pushed for disclosure, even though the counseling communications between the officer and Ms. Beyer went well beyond any purely factual discussion of the incident and delved, instead, into numerous subjects which had absolutely nothing to do with the shooting itself and which were, in good measure, of a highly personal nature. (*See* R. 111, pp. 23, 46; R. 119-4, pp. 14-15.)

The Petitioner's purported "need" for access to the content of the counseling sessions and the resultant notes to test the credibility of Redmond's memory is contrived, not genuine. Petitioner has grossly distorted the record in representing that Officer Redmond claimed that her memory of the shooting was better at trial than it had been shortly after the incident. (Pet. Br. 21) In actuality, Ms. Redmond was responding to a far narrower inquiry dealing only with her recollection of how she was holding her gun. (App. 141, 142)

Petitioner had at her disposal other readily available, less intrusive means of testing the veracity of the officer's account of the shooting. For example, Redmond had prepared a draft police report on the date of the occurrence. She completed it the next day. This report was produced to plaintiff in discovery, and counsel utilized it in cross-examining the officer at trial. (App. 148-150) The officer had also been orally interviewed by one of her superiors that same day. The interview was transcribed and also produced to plaintiff's counsel during discovery. He likewise utilized it in cross-examining Redmond at trial. (App. 140-143, 149) Counsel had a 324 page transcript of the officer's deposition testimony to utilize.[11] Lastly, Petitioner's counsel had available to him numerous eyewitnesses whose accounts could serve as a further check on the officer's recounting of events. Petitioner put four of these witnesses, all siblings of the decedent, on the stand. (R. 165 at pp. 34-95; R. 166 at pp. 102-149, 167-223, 250-295.)

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[11] This does not include the additional 100 pages that was generated as a result of the District Court's April 14, 1992 order. (R. 73, 117-1.)

There is no evidence of record to show that Officer Redmond's version of the occurrence itself ever changed in any material respect. There was never any denial on the officer's part that she had, in fact, fired the single shot that killed Ricky Allen. She so stated in her report, in her statement to then-Sgt. Syre, in her answer to Petitioner's Complaint (App. 13), and in her testimony. (App. 96) The "crucial importance" which plaintiff attaches to Ms. Beyer's testimony that at one point in time during counseling, Ms. Redmond "could not remember pulling the trigger" (Pet. Br. 22) is thus illusory. Petitioner's parenthetical note that Redmond denied this at trial is another mischaracterization. (App. 101) Furthermore, Ms. Beyer's compelled deposition testimony revealed no material factual discrepancies. (R. 111 at pp. 40-43, 47-49.) Her trial testimony demonstrated that Redmond and she did not discuss all of the factual details of the shooting during counseling. (App. 113, 121)

Petitioner has not, and cannot, point to anything of substance in the record to buttress her current suggestion that Ms. Beyer had somehow "enhanced", "rehearsed", or "synthesized" Redmond's factual recollection of the incident. (Pet. Br. 22-23, 25) Though given the opportunity by the district court to query Ms. Beyer at length, at least with respect to any discussion of the facts of the incident, Petitioner utterly failed to develop any factual basis for equating these counseling sessions with "phoneying-up" and "parroting". (Pet. Br. 22, n. 29.)

Officer Redmond clearly held a justifiable expectation of privacy. Under Illinois law, she, as a patient, and Karen Beyer, as her therapist, had a privilege to refuse to disclose and to prevent the disclosure of her record or communications. 740 ILCS 110/10. Given the strong policy of comity between state and federal sovereignties, where a state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule. *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981). Here, the district court defeated that expectation by employing a mechanistic reading of Rule 501 which failed to account adequately for reason and experience. The Seventh Circuit corrected that error.

CONCLUSION

Respondents respectfully request that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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No. 95-266

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr., Deceased,

Petitioner,

v.

MARYLU REDMOND, Hoffman Estates Police Officer,
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT

The parties disagree about how the federal courts should balance a litigant's need for relevant evidence with an opponent's interest in confidential counseling with a social worker. Petitioner urges that these privacy interests can be fully protected through the district court's power "to exercise appropriate control over the discovery process." *Herbert v. Lando,* 441 U.S. 153, 177 (1979). Respondents disagree and ask the Court to fashion a broad testimonial privilege that would shield from disclosure at trial any impact the counseling process had on the party's ability to recall a particular incident.

Respondents are joined by distinguished amici in their plea for a broad privilege. In their efforts to assist the Court, however, amici have misread the record in several important aspects. One misunderstanding is about respondent Redmond's affirmative representation at trial that her memory of the incident was better after fifty counseling sessions than it had been immediately after the event.[1] A second misunderstanding of the record is to equate the counseling that respondent Redmond received with classic psychoanalysis. Another misunderstanding is about the manner in which respondent Redmond sought to preserve her privilege. Rather than politely and firmly informing the district court that she was persisting in her invocation of a privilege, respondent Redmond claimed an inability to recall any of her conversations with the social worker. If this inability to recall was genuine, the jury was entitled to be informed of Redmond's memory problem. If, however, Redmond feigned an inability to recall, it can hardly be said that she was "careful to preserve the privilege." (Brief of Amicus Curiae United States at 7.)

Amici are also confused about the district court's orders permitting inquiries about the counseling sessions. The district judge never ordered "unrestricted and unlimited inquiry" into respondent Redmond's communications with the social worker. (Brief Amicus Curiae of the ACLU at 4.) The trial judge permitted petitioner to make a "narrow inquiry" into communications limited to recollections of the episode (Pet.App. 36) and required that respondent Redmond's deposition be supervised by a magistrate judge. (Pet.App. 38-39.) The district judge ordered production of the social worker's notes after finding that respondent Redmond had been untruthful in claiming an inability to recall what she had told the counselor about the episode. (Pet.App. 57.)

The United States, as amicus curiae, suggests that the Court adopt a federal evidentiary privilege the scope of which would be delimited by the privilege recognized by the state in which the counseling took place. (Brief of the United States 28.) Such a federal privilege would be difficult to administer because state law is a moving target: state legislatures frequently add exceptions to state privilege statutes and state appellate courts have not been hesitant to create exceptions to broad statutory privileges. Moreover, tying a federal privilege to state law would lead to anomalous results — a person who obtains counseling in Maryland would be entitled to a federal privilege, but there would be no privilege if the counseling took place in Virginia. In addition, the government's approach would require reversal in this case under a recent amendment to the Illinois privilege statute.

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[1] Petitioner is accused by respondents of misreading the record about the improvement in respondent Redmond's memory during therapy. (Resp.Br. 37.) The trial record contains the following questions and answers of respondent Redmond (App. 141-42):

> THE COURT: Now, Ms. Redmond, you are being asked whether your memory today is better than it was a few hours after the incident on how you were holding the gun.
>
> THE WITNESS: Then it would be yes.
>
> PETITIONER'S COUNSEL: It's better today?
> A. As far as how I held the gun.

The record also contains the following questions and answers of social worker Karen Beyer (App. 113):

> PETITIONER'S COUNSEL: Well, did you ever write down that she told you that she could not remember pulling the trigger?
> * * *
>
> BEYER: Yes. At one point in time she did say that to me. She was concerned about details like that.
>
> Q. Okay. And was she able to recall details of the incident when [she] spoke with you in those 50 sessions?
> A. Yes. And she even later recalled pulling the trigger.

In our view, these questions and answers fully support our contention that respondent Redmond's ability to recall and recount the incident improved during counseling.

Other distinguished amici ask the Court to approve a broad privilege that would cover psychoanalysis,[2] psychotherapy,[3] clinical social workers,[4] counselors,[5] and would be especially applicable to police officers.[6] Although we sympathize with police officers who are improperly accused of wrongdoing, the qualified immunity doctrine provides police officers with ample protection. Police officers should not be afforded complete confidentiality in counseling. Rather, consistent with the Court's approval of urinalysis testing in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 670 (1989), and as reflected in the Employee Assistance Program regulations of the Drug Enforcement Administration, individual privacy rights must give way to society's need to protect itself from persons who should not have a police officer's authority to use deadly force.

As in *Upjohn v. United States*, 449 U.S. 383, 396 (1981), the Court should decline "to draft a set of rules" and instead rely on case-by-case balancing by district court judges. While case-by-case balancing "may to some slight extent undermine desirable certainty," such balancing "obeys the spirit of the

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[2] Brief Amicus Curiae of George R. Caesar, M.D. et al. at 20-21.

[3] Brief Amicus Curiae of the American Psychiatric Association at 3; Brief Amicus Curiae of the American Psychological Association at 21;

[4] Brief Amicus Curiae of the NASW et al. at 4.

[5] Brief Amicus Curiae of the ACLU Br. 20; Brief Amicus Curiae of National Network to End Domestic Violence at 21-22; Brief Amicus Curiae of American Counseling Association at 25-26; Brief Amicus Curiae of Menninger Foundation at 27-28.

[6] Brief Amicus Curiae of the National Association of Police Organizations at 17; Brief Amicus Curiae of the International Union of Police Associations at 13.

Rules [of Evidence]." *Id.* at 396. Federal statutes governing disclosure of alcoholic treatment records provide an appropriate model for case-by-case balancing.

Respondents concede that the balancing of competing interests in this case was performed in the first instance by the Court of Appeals (Resp.Br. 12, 30, 35), but argue that the court below was correct in its factual determinations. (Resp.Br. 35-36.) Respondents also argue that credibility is not relevant to the "objective reasonableness" test of *Graham v. Connor* 490 U.S. 386 (1989). (Resp.Br. 36.) The Court, however, explicitly recognized in *Graham*, that credibility may be relevant to "objective reasonableness," *id.* at 399 n.12. This is especially true in this case, where the officer and family members of the deceased were the only witnesses to the officer's use of fatal force.

I. The Record Fails to Show that Respondent Received "Psychoanalytic Psychotherapy"

The record fails to support the contention that this case involves "confidential communications" made "for the purposes of psychotherapeutic treatment." (Brief of Amicus Curiae United States at I.) Nor does the record support the argument that respondent Redmond was receiving "psychoanalytic psychotherapy."[7]

Respondent Redmond began counseling at the suggestion of Karen Beyer "to use the employee wellness program." (Beyer Dep. 22, Jan. 26, 1993.)[8] The employee wellness program provides a variety of services, including medical screening, psychological counseling and testing, and financial counseling.[9] Beyer, an employee of respondent Hoffman Estates, extended the invitation because Redmond "had been involved in a critical incident." *Id.*

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[7] Brief of Amicus Curiae American Psychoanalytic Association at 7 n.4.

[8] This deposition was filed under seal as Record Item No. 111.

In her motion to quash the subpoena to Beyer, respondent Redmond asserted that she had "received counseling from Karen Beyer."[10] (App. 16.) Respondent supported her motion with an affidavit from Beyer stating that all of her conversations with respondent had "been in my professional capacity as a licensed clinical social worker and certified employee assistance counselor and have pertained to my provision of counseling and counseling services to Ms. Redmond." (App. 18.) The motion to quash did not contain any further description of the counseling and did not set out any assertion that the communications were "necessary for treatment."[11]

The social worker was described for the first time as a "psychotherapist" in her motion to reconsider the district court's order refusing to quash the subpoena. (App. 36.) At no time, however, did the social worker identify the particular type of therapy she administered. (Beyer Dep. 60, July 13, 1992.)[12]

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[9] A description of the services provided by the program appears as Exhibit "A" to Record Item No. 81.

[10] Respondent repeated this description in the memorandum she filed in support of her motion, referring to Beyer as "a professional" to whom Redmond had "reasonably turned to obtain counseling following a difficult episode in her professional life." (App. 27.)

[11] This omission is at odds with respondents' present position that a privilege should only apply to communications that were "necessary for treatment." (Resp.Br. 10.)

[12] This deposition is an exhibit to Record Item No. 91.

The social worker's descriptions of the counseling sessions suggest that Beyer was working as a "social therapist," rather than as a psychotherapist.[13] At their first counseling session, Beyer talked about the shooting and about how Redmond was coping. (Beyer Dep. 23, Jan. 26, 1993.) At the second session, the two discussed problems that Redmond was having sleeping, concentrating, and eating and may have discussed relationship problems that were ongoing at the time of the shooting. (*Id.* at 23-24.)

At some point in counseling, the social worker listened to a tape recording of Redmond's police radio dispatches from the incident (Beyer Dep. 23-24, Jan. 26, 1993) and "may have" reviewed police reports about the shooting. (*Id.* at 20.) The social worker explained that she sought this information "in order to enhance my relationship with the client."[14] (*Id.* at 32.)

The counseling that respondent received can be fairly described as "reality interventionist,"[15] which is more akin to counseling rather than to psychotherapy.[16] Either form of intervention can, as amicus NASW acknowledges, affect "subsequent recall of events."[17]

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[13] As described in Bollas & Sunderson, *The New Informants* (1996), the social therapist "would not only discuss the client's feelings but would also explore, initiate, support and carry out practical actions that would help resolve the problem." *Id.* at 159. A psychoanalyst, however, would remain silent and listen to the client's free associations of "unconscious ideas, memories, and feelings that contribute to his mental suffering." *Id.* at 61.

[14] This willingness to depart from "psychic reality" distinguishes the social worker's counseling from the psychoanalyst's therapy. The contention of the National Association of Social Workers (Brief Amicus Curiae NASW at 10) that social workers provide the "same" psychotherapy services as psychiatrists and clinical psychologists is somewhat overstated.

[15] Bollas & Sunderson, *The New Informants*, 64 (1996).

[16] "Counseling may be more involved with situational distress, while psychotherapy deals with personality reorganization." Shilling, *Perspectives on Counseling Theories* 2 (1984).

The impact of therapy on ability to recall is illustrated in *Wescott v. Crinklaw*, 68 F.3d 1073 (8th Cir. 1995). There, immediately after using deadly force, a police officer stated that the deceased had not turned in a menacing manner and that he "did not know" if the deceased had a gun in his hand. *Id.* at 1075. After therapy, the officer's recollections of the incident changed; the officer testified at trial that at the time of the shooting, he believed that his life was in danger.[18] *Id.* at 1080.

One mechanism that explains the change in perceptions that occur during therapy is known as "behavioral confirmation," which is "the essence of the self-fulfilling prophecy," Copeland, ***Prophecies of Power: Motivational Implications of Social Power for Behavioral Confirmation,*** 67 J. Personality and Social Psychology 264 (1994), and is quite different from inducing a false memory.[19] "Behavioral

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[17] Brief Amicus Curiae NASW at 26 n.40.

[18] Prompt post-incident debriefing may well minimize post-traumatic stress symptoms. Brief of Amicus Curiae Int'l Union of Police Assoc. 12. *Wescott*, however, illustrates the potential impact of debriefing on the integrity of the fact-finding process.

[19] The American Psychiatric Association overlooks this distinction in its amicus submission (at 26). Similarly, the American Association of State Social Work Boards (Amicus Br. 11) mistakenly asserts that our reference to the behavioral confirmation research means that we are "malign[ing] social workers as therapists." We are not seeking to malign any school of counseling or therapy. The existence of behavioral confirmation has been extensively documented. *See* Jones, *Interpreting Interpersonal Behavior: The Effects of Expectancies,* 234 Science 41, 43 (1986). Our position is simply that psychotherapy and counseling include "the use of suggestion, persuasion, reeducation, reassurance, and support." Brief Amicus Curiae of American Counseling Association 24 n.11, quoting *Dorland's Illustrated Medical Dictionary* 1284 (25th ed 1974).

confirmation" occurs "when clients actually come to behave in ways consistent with therapists' erroneous impressions."[20] "[I]nteractions between therapists and clients may be particularly conducive to behavioral confirmation processes."[21]

By listening to the police communication tapes, the social worker was departing from the "psychic reality" of "[f]ull disclosure in the psychotherapeutic context."[22] The social worker's interest in the communication tapes is inconsistent with attempting to "uncover[] the emotional effects" of the incident.[23] The record in this case does not provide any reason to believe that counseling exposed respondent Redmond's "most intimate thoughts, feelings, and fantasies,"[24] or brought "to light information about the unconscious that even the patients themselves were not aware of prior to the treatment."[25] On the contrary, respondent Redmond appears to have received counseling similar to that contemplated by the Bureau of Alcohol, Tobacco and Firearms in its Employee Assistance Regulations.[26]

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[20] Copeland & Snyder, *When Counselors Confirm: A Functional Analysis,* 21 Pers. and Social Psych. Bull. 1210 (1995).

[21] Snyder & Thompson, *Interactions between Therapists and Clients: Hypothesis Testing and Behavioral Confirmation,* in Turk & Salovey (eds), *Reasoning, Inference and Judgment in Clinical Psychology* (1988), 146

[22] "Full disclosure in the psychotherapeutic context . . is not a process concerned with identifying and establishing objective facts but rather a technique designed to explore the patient's inner perceptions, concerns and difficulties." Brief Amicus Curiae of American Psychoanalytic Association at 22-23.

[23] Brief Amicus Curiae of NASW 27.

[24] Brief Amicus Curiae of American Psychological Association at 13.

[25] Brief Amicus Curiae of American Psychoanalytic Association at 26. (emphasis omitted)

[26] ATF Order O 2900.1A, *ATF Employee Counseling Program,* (September 14, 1988) provides as follows (par. 6):

> Counseling, as referred to in this order, is not what is traditionally

Statements made in the course of "full disclosure in the psychotherapeutic context" may well have less relevancy than statements made by a person who is being counseled by a "social therapist." This distinction supports the exclusion of social workers and other counselors from the psychotherapist-client privilege of Proposed Rule of Evidence 504. The determination of whether statements made to a therapist or counselor are relevant should be made in the first instance by the district judge and should not be a part of any new privilege.

II. Respondent Sought to Preserve the Asserted Privilege by Feigning an Inability to Recall

The United States is mistaken in asserting that respondent Redmond was "careful to preserve the privilege." (Brief of Amicus Curiae United States at 7.)

The accepted and ordinary way to preserve a privilege is to "refuse compliance, be held in contempt, and then appeal the contempt order." *Church of Scientology of California v. United States,* 506 U.S. 9, 15 n.11 (1992). In this case, the district court offered to follow the procedure approved by the Seventh Circuit in *Memorial Hospital v. Shadur,* 664 F.2d 1058 (7th Cir. 1981), and impose a mild contempt sanction "for purposes of creating an issue that could then be carried

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> thought of as an in-depth program of treatment. Rather, it is a process whereby a trained counselor seeks to identify a problem and, if warranted, provides short-term services to help the employee overcome the problem. Where short-term problem resolution is not appropriate, the counselor will direct the employee to sources of treatment and rehabilitation best suited to the employee's individual needs.

A copy of this order will be lodged with the Clerk of the Court.

on up." (Pet.App. 44.) Respondent, though, rejected this invitation to seek appellate review. Instead, when ordered by the district court to answer questions about what she had told her counselor about the facts of the incident, respondent Redmond asserted an inability to recall. (App. 102-07.)

The path that respondent Redmond chose is similar to that condemned by the Court in *Walder v. United States,* 347 U.S. 62, 65 (1954), where the defendant argued for the right to present "perjurious testimony in reliance on the Government's disability to challenge his credibility."[27]

If respondent Redmond was being truthful in her inability to recall, the jury properly considered her memory problem in evaluating Redmond's credibility. It is correct, as respondent argues (Resp.Br. 36), that plaintiff's Fourth Amendment claim turns on the "objective reasonableness" test of *Graham v. Connor* 490 U.S. 386 (1989). But to determine the facts that confronted the officer, the finder of fact is required to assess "the credibility of an officer's account of the circumstances that prompted the use of force." Id. at 399 n.12. This credibility determination requires an evaluation of the officer's ability at trial to recall and recount the "objective facts of the incident," which must be "filtered through the lens of the officer's perceptions at the time of the incident in question." *Rowland v. Perry,* 41 F.3d 167 (4th Cir. 1994).

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[27] Following *Walder*, the Court has consistently refused to permit criminal defendants to misuse exclusionary rules, holding that voluntary statements taken in violation of *Miranda* warnings, as well as illegally obtained evidence, may be used to impeach. *Harris v. New York,* 401 U.S. 222 (1971) (oral statements); *Oregon v. Haas,* 420 U.S. 714 (1975) (same); *United States v. Havens,* 446 U.S. 620, 626 (1980) (illegally seized evidence).

Respondent Redmond's inability to recall — whether due to a genuine failure of memory or, as the district judge found (Pet.App. 52), feigned as a tactic to flout the district court's rejection of her asserted privilege — requires that the decision of the Seventh Circuit be reversed even if the Court adopts the broad privilege fashioned by the Court of Appeals.

III. The District Court Ordered Production of Counseling Records only after Finding that Respondent Redmond Was Feigning an Inability to Recall

Amici are confused about the nature and scope of the district court's orders requiring testimony by respondent and the social worker and directing production of the social worker's notes.[28]

The trial judge permitted petitioner to make a "narrow inquiry" into communications limited to recollections of the episode (Pet.App. 36) and required that the deposition be supervised by a magistrate judge. (Pet.App. 38-39.) The district court barred inquiry into any area beyond statements about the shooting. (Pet.App. 47-47.) Contrary to the suggestion of amicus American Psychiatric Association (Br. 22), the district court's ruling protected all other statements made in the course of counseling.

The district judge ordered production of the social worker's notes "which relate to the subject matter" of the incident after finding that respondent Redmond had been untruthful in claiming an inability to recall what she had told the counselor about the episode. (Pet.App. 57.) Based on three pages of heavily redacted notes that the social worker produced in response to the district court's order, petitioner demonstrated that respondent had been untruthful at her deposition. (App. 70-72). Then, and only then, did the trial judge order the social worker to produce her unredacted notes for inspection "for counsel's eyes only." (App. 73.) The social worker, who was then a full time employee of respondent Hoffman Estates, refused to comply with this order. The disobedience of both respondents — rather than respondent Redmond's assertion of a privilege — was the basis for the district court's instruction about the counseling records.

IV. State Statutes Provide a Poor Model for a Judicially Created Federal Privilege

The United States, as amicus curiae, suggests that the scope of a federal psychotherapist-client privilege should be determined by the law of the state in which the communication occurred. (Brief Amicus Curiae of the United States at 28.) This argument, if accepted, requires reversal of the Court of Appeals because the Illinois privilege statute — as construed by the Illinois courts and as recently amended — does not provide respondent Redmond with a guarantee of confidentiality.

As recently amended,[29] the Illinois privilege statute permits a social worker "to communicate at any time and in any fashion with his present or former employer . . . concerning any care or treatment he or she provided, or assisted in providing, to any patient within the scope of his or her employment."[30] This provision permits the employee assistance counselor to inform his (or her) employer about the airline pilot who has a drinking problem, the jail guard who has a drug problem,[31] or the police officer who has a self-control problem.[32]

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[28] Amicus ACLU mistakenly asserts that the trial judge ordered "unrestricted and unlimited inquiry." (Brief Amicus Curiae ACLU at 4.) Amicus American Psychiatric Association incorrectly contends that the district court's ruling "would justify examination of the whole psychotherapist-patient interaction." (Brief Amicus Curiae Amer. Psychiatric Assoc. at 17.)

[29] The amendment became effective on March 9, 1995, and applies to all actions filed "on or after its effective date." Public Act 89-7 (March 9, 1995).

In addition to the statutory exception, the Illinois courts have construed the state therapist statute to permit a trial court's *in camera* review of a witness's therapy records.[33]

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[30] Ill. Compiled Stat. Ann. ch. 740, §110/10(3.2) (1995) provides as follows:

> A therapist has the right to communicate at any time and in any fashion with his present or former employer, principal, partner, professional corporation, or professional liability insurance carrier, or counsel for any of those entities, concerning any care or treatment he or she provided, or assisted in providing, to any patient within the scope of his or her employment, affiliation, or other agency with the employer, principal, partner, or professional corporation.

[31] *Cf. Moreland v. Department of Corrections*, 166 Ill.App.3d 1040, 520 N.E.2d 1227 (1988) (upholding discharge of nurse employed at prison who informed her supervisor that she was taking a leave to enter a drug treatment program).

[32] The Illinois limitation on confidentiality is consistent with federal regulations applicable to workers at some nuclear power plants. 10 C.F.R. §26.25 (1995) provides, in pertinent part, as follows:

> The employee assistance program staff shall inform licensee management when a determination has been made that any individual's condition constitutes a hazard to himself or herself or others (including those who have self-referred).

[33] To date, this rule has only been applied in criminal cases. *See, e.g., People v. Phipps*, 98 Ill.App.3d 413, 424 N.E.2d 727 (1981). *People v. Monk*, 174 Ill.App.3d 528, 528 N.E.2d 1063 (1988); *People v. Printy*, 232 Ill.App.3d 735, 598 N.E.2d 346 (1992); *People v. McMillan*, 239 Ill.App.3d 467, 607 N.E.2d 659 (1993).

People v. Bean 137 Ill.2d 65 560 N.E.2d 258 (1990). In the view of the Illinois Supreme Court, such *in camera* inspection does not unreasonably encroach on "the individual recipient's interest in maintaining the secrecy of this personal information." 137 Ill.2d at 100, 560 N.E.2d at 274.

The Illinois Supreme Court is not alone in creating exceptions to broad statutory privileges. Several other states have reached similar holdings approving *in camera* review of documents protected by a statutory counseling privilege.[34]

In addition to requiring the lower federal courts to make predictions about how state law would be construed by the state courts, the government's suggestion that a federal privilege be tied to state law is inconsistent with the express language of Rule 501, which requires a uniform privilege for all federal claims. Moreover, relying on state law for a federal privilege would lead to anomalous results. Maryland has a broad psychotherapist-client privilege. Md. Code. Ann. Cts. & Jud. Proc. §9-109 (1989 & Supp. 1993). The Virginia privilege, though, is subject to case-by-case balancing by the trial judge. Va. Code Ann. §8.01-400.2 (Michie 1992). Thus, under the government's proposal, a person who obtains counseling in Maryland would be entitled to a federal privilege, but there would be no privilege if the counseling took place in Virginia. This type of geographical variation (which, of course, is not limited to Maryland and Virginia) has no place in a federal rule. The extent to which a person may enforce a federal statutory remedy should not be determined by a state legislature. The government's suggestion that the scope of a federal counseling privilege be delimited by state law should be rejected.

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[34] *See, e.g., Commonwealth v. Two Juveniles*, 397 Mass 261, 491 N.E.2d 234 (1986); *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557 (1994); *State v. Gagne*, 136 N.H. 101, 612 A.2d 899 (1992); *State v. Ramos*, 115 N.M. 718, 858 P.2d 94 (1993); *People v. Arnold*, 177 A.D.2d 633, 576 N.Y.S.2d 339 (1991); *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992).

V. An Individual Police Officer's Interest in Confidentiality Is Outweighed by Society's Interest in Identifying Impaired Individuals and Compensating Their Victims

Respondents argue that because of their position police officers should be encouraged through a broad privilege "to seek qualified professional help." (Resp.Br. 18-26.) But it is precisely because of their position that police officers should not be afforded absolute confidentiality in counseling.

Police officers are authorized to carry firearms, are required to make arrests, and are entrusted with the power to use lethal force. Most states shield police officers from civil liability for mere negligence; in Illinois, for example, a civil action against a police officer generally requires proof of "willful and wanton" misconduct.[35] Police officers also have a broad immunity from suit under 42 U.S.C. §1983 unless their conduct was unreasonable in light of clearly established law. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Davis v. Scherer,* 468 U.S. 183 (1984); *Elder v. Holloway,* 114 S.Ct. 1019 (1994). Granting police officers a further immunity through a counseling privilege would be the same type of "double counting," *Calder v. Jones,* 465 U.S. 783, 796 (1984), that the Court has consistently rejected. *See, e.g., Herbert v. Lando,* 441 U.S. 153 (1979) (no First Amendment privilege to bar inquiry into editorial process).

The Court has recognized that persons "who may use deadly force plainly 'discharge duties fraught with such risks

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[35] *Fitzpatrick v. City of Chicago,* 112 Ill.2d 211, 492 N.E.2d 1292 (1986).

of injury to others that even a momentary lapse of attention can have disastrous consequences.'" *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 670 (1989), quoting *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 628 (1989). As with drug screening, "the public should not bear the risk that employees who may suffer from impaired perceptions and judgment" will be permitted to continue to discharge their sensitive duties because of a broad counseling privilege.

That confidentiality must yield to public safety is reflected in the Employee Assistance Regulations of the Drug Enforcement Administration. These regulations make plain that there is no confidentiality when the counselor learns that the employee is unable to perform his (or her) duties safely and reasonably.[36]

Respondents' argument that confidentiality is the *sine qua non* of counseling (Resp.Br. 22-23) cannot be demonstrated by empirical evidence. It is noteworthy that Professor Shuman, a recognized authority in this area, admits that the empirical evidence to support a privilege is not compelling. (Brief Amicus Curiae ACLU at 17 n.15.) Nonetheless, Professor Shuman argues that a privilege should be recognized "because of its impact on the right to privacy." *Id.*

This Court has consistently required more than sincerely held beliefs as the predicate for a new privilege. For example, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court declined to create a new privilege because it was "unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." *Id.* at 693.

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[36] The DEA regulations foreclose any privilege for statements about "criminal behavior," and mandate disclosure when "an employee's problem has been determined to pose a substantial risk or threat to his or her health or well being, or that of co-workers, family members, or the public." DEA Personnel Manual, March 27, 1992, Section 2794.47-4(B). (A copy of the relevant sections of the manual will be lodged with the Clerk of the Court.)

Respondents' demand for confidentiality must be balanced against society's need to protect itself from persons who should not have a police officer's authority to use deadly force. The broad right to privacy urged by respondents would have protected from disclosure the threats made against an administrative law judge in *United States v. Snelenberger*, 24 F.3d 799 (6th Cir. 1994),[37] and the threats against the life of a federal district judge in *Viviano v. Moan*, 645 So.2d 1301 (La. Court of Appeals 1994).

A far better approach than the creation of a new privilege is to rely on the district court's power to make case-by-case decisions and "to exercise appropriate control over the discovery process." *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

VI. Case-by-Case Balancing Is Preferable to Creation of a New Privilege

The government argues against case-by-case balancing. (Brief Amicus Curie of the United States at 26.) But as amicus NASW notes,[38] Congress established clear guidelines for case-by-case balancing in the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1974, Pub.L. 93-282, 88 Stat. 125. Section 333(b)(2)(c) of the Act provides that a court may compel the disclosure of otherwise confidential records on "good cause." The statute sets out a simple test, requiring the district judge to "weigh the public interest and the need for disclosure against the injury to the patient or subject, to the physician-patient relationship, and to the treatment services."

Congress adopted this explicit balancing test to replace the absolute bar on disclosure contained in the 1970 Act. Pub.L. 91-616, 84 Stat. 1848. Congress again employed this balancing test in the Veterans Omnibus Health Care Act of 1976, Pub.L. 94-581, 90 Stat. 2842, compiled as 38 U.S.C. §7332(b)(2)(D).

In this case, respondents did not seek to show that respondent Redmond would be harmed by disclosure of the statements she made to the counselor about the shooting. Indeed, it is difficult to conceive of any case where repeating the words spoken to describe a particular incident would be injurious to therapy. Disclosure of what respondent Redmond told the social worker about the shooting does not involve respondent Redmond's "feelings and interpretations." Brief of Amicus Curiae American Psychological Association at 20.

As in *Skipper v. South Carolina*, 476 U.S. 1, 9 (1986), the evidence from petitioner's family members "was the sort of evidence that a jury naturally would tend to discount as self-serving." Respondent Redmond's admission that her memory had "improved" during counseling was crucial to petitioner's challenge to Redmond's credibility and, as in *Skipper*, it is "implausible" to characterize the admissions as cumulative.

Case-by-case balancing is an evaluation that should be carried out in the first instance by the district court. As Professor Slovenko recognized when he retreated from his advocacy of a therapy privilege, "privilege is, in the case of psychotherapy, an unnecessary and misleading claim." Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope,* 23 Cath. U. L. Rev. 649, 673 (1974).[39]

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[37] That the threats should have remained confidential is argued in Note, *Did Congress Err in Failing to Set Forth Codified Rules Governing Privileged Relationships and Resulting Communications*, 72 U. Det. Mercy L. Rev. 181 (1994).

[38] Brief Amicus Curiae NASW at 19.

CONCLUSION

One dominant theme of the Federal Rules of Evidence is to uphold the admission of logically relevant evidence. It can fairly be said that Congress' message to the Court was: When in doubt, admit. The Court should decline to create a new privilege and instead rely on the good sense and sound discretion of district judges. The decision of the Court of Appeals should be reversed and the case remanded with instructions to reinstate the judgment of the district court.

January, 1996

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[39] Amicus American Psychiatric Association suggests (at 16) that we have misstated Professor Slovenko's views by relying on his 1994 letter to the editor of the American Journal of Psychiatry. Our understanding of the change in Professor Slovenko's view from his 1960 article, Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 Wayne L. Rev. 175 (1960), is derived from his above cited 1974 article.

(18)

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In the Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, PETITIONER

v.

MARYLU REDMOND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether confidential communications made by a patient to a psychotherapist in the course of and for the purposes of psychotherapeutic treatment are privileged under Rule 501 of the Federal Rules of Evidence.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the federal courts should recognize a privilege under Rule 501 of the Federal Rules of Evidence for confidential communications between a clinical social worker and a patient made in the course of psychotherapeutic treatment. As a frequent litigant in federal courts, the federal government has an interest in the reliability of the judicial fact-finding process, and thus in the broad availability of relevant evidence in civil and criminal cases.

The federal government also has an interest in the availability and effectiveness of psychotherapeutic treatment, especially when a federal employee is involved in a stressful incident arising out of or in the course of employment. Agents of the various federal law enforcement agencies, for example, are often involved in traumatic incidents like that in this case. Federal law enforcement agencies encourage—or, in some cases, require—agents involved in such incidents to obtain psychotherapeutic treatment and counseling. Such incidents may result in litigation. If statements made during psychotherapeutic treatment are not privileged, the prospect of such litigation may affect the agents' willingness to obtain therapy.

FEDERAL RULE INVOLVED

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privileges of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT

1. Respondent Redmond, a police officer of respondent Village of Hoffman Estates, Illinois (Village), responded to a reported fight in progress at an apartment complex. She was informed that there had been a stabbing. Shortly after arriving on the scene, she shot and killed Ricky Allen, Sr. She testified that, at the time of the shooting, Allen was pursuing and gaining on another man, whom he was poised to stab with a butcher knife. Four of Allen's brothers and sisters testified that he was unarmed at the time of the shooting. A butcher knife was found at the scene, although witnesses for petitioner testified that the butcher knife did not appear until after Allen's body was removed. Pet. App. 2-5.

After the shooting, Redmond sought counseling from Karen Beyer, a licensed clinical social worker certified by Illinois as an employee assistance counselor and employed by the Village. Redmond met with Beyer two to three times each week for at least six months, beginning a few days after the shooting. Pet. App. 5-6.

2. Petitioner, on behalf of Allen's estate, commenced this action against Redmond and the Village in the United States District Court for the Northern District of Illinois. Petitioner claimed that Redmond had deprived Allen of his civil rights under 42 U.S.C. 1983 because her use of deadly force violated the Fourth Amendment, and that Redmond was also liable under a state wrongful death statute for having caused Allen's death. J.A. 8-12.

When Redmond was deposed, petitioner asked her questions concerning the substance of her communications with Beyer. Redmond asserted privilege and refused to respond. Petitioner subsequently subpoenaed Beyer to testify at a deposition. Pet. App. 6. The district court refused to quash the subpoena, based on the court's belief that any psychotherapist-patient privilege that would be applicable would extend only to psychiatrists and psychologists and would not extend to Beyer, who was a social worker. Pet. App. 7 & n.5. Throughout discovery and at trial, Beyer and Redmond continued to attempt to protect the confidentiality of communications between them, see Pet. App. 8-9, though Beyer ultimately gave limited testimony concerning Redmond's "factual description of the events leading up to the shooting." Pet. App. 9; see J.A. 112-122. Beyer also testified about the timing, duration, and number of her meetings with Redmond. J.A. 112-113. Aside from three redacted pages, Beyer never produced her notes and never testified concerning Redmond's disclosures concerning her thoughts and intentions. Pet. App. 8. Redmond testified about the timing, duration, and number of her meetings with Beyer, J.A. 100-101. In response to questions regarding what she had told Beyer, she consistently responded, "I can't recall." J.A. 102-107.

The trial court instructed the jury that there was no legal justification for Beyer to refuse to turn over her notes, and that the jury was therefore "entitled to presume that the contents of the notes would be unfavorable to [respondents]." Pet. App. 9 & n.9. The jury returned a verdict in favor of petitioner for $45,000 for the Section 1983 claim and $500,000 for the state wrongful death claim. Pet. App. 11.

3. Respondents raised two issues on appeal. First, they argued that the instructions concerning deadly force were incorrect. The court of appeals rejected that argument (Pet. App. 12-14), and it is no longer of relevance in this case.

Respondents also argued that the district court's instructions incorrectly informed the jury that there was no privilege applicable, and that the instructions improperly stated that the jury could draw an adverse inference from respondents' failure to disclose information regarding Redmond's disclosures to Beyer during psychotherapy. The court of appeals held that there was a psychotherapist-patient privilege and that it was applicable to Beyer as a licensed clinical social worker. Accordingly, the court reversed the judgment and remanded for a new trial. Pet. App. 15-23.

The court of appeals noted that, under Fed. R. Evid. 501, "the privilege of a witness * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The court stated that in its view the need for a psychotherapist-patient privilege had increased in recent years, because of increasing crime and violence that puts stress on witnesses, bystanders, and police officers. Pet. App. 17-18. The court also stated that "[r]eason tells us that psychotherapists and patients share a unique relationship, in which the patient's ability to communicate freely without the fear of public disclosure is the key to successful treatment." Pet. App. 18. The court noted that "communications with a psychotherapist often involve highly personal matters, the disclosure of which would frequently be embarrassing to the point of mortification for the patient." Pet. App. 19 (internal quotation marks omitted). Finally, the court noted that "all fifty states have recognized the need for and have adopted varying forms of the psychotherapist-patient privilege." Pet. App. 20. Based on those facts, the court found that recognition of a privilege under Rule 501 was warranted.

With respect to the scope of the privilege, the court held that it "will determine the appropriate scope of the privilege by balancing the interests protected by shielding the evidence sought with those advanced by disclosure." Pet. App. 22 (internal quotation marks omitted). The court "decline[d] to speculate as to what situations would call for the abrogation of this privilege," finding that in "a factual situation [like this case] * * * the balance of the competing interests tips sharply in favor of the privilege if we hope to encourage law enforcement officers who are frequently forced to experience traumatic events by the very nature of their work to seek qualified professional help." *Ibid.*

Finally, the court held that the scope of the privilege should include not only psychiatrists and psychologists, but "other mental health care providers as well, including licensed clinical social workers." Pet. App. 22 n.19 (italics omitted). Noting that "social workers have been characterized as the 'poor person's psychiatrist,'" the court found that distinguishing practitioners like petitioner Redmond's psychotherapist, who was fully licensed under state law, from professionals with other job titles "serves no discernible public purpose." Pet. App. 23 n.19.

SUMMARY OF ARGUMENT

Federal Rule of Evidence 501 instructs courts that the claim of privilege of a witness "shall be governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience." As the decisions of this Court and the legislative history of the Rule confirm, that language does not "freeze" the law of privileges as of a particular date or disable the federal courts from recognizing a privilege that was not historically accepted at common law. Since recognition of a privilege potentially results in the unavailability of relevant and probative evidence, however, the proponent of the privilege must shoulder a heavy burden of showing that the social benefits of recognizing the privilege outweigh the potential injury to the judicial fact-finding function.

Recognition of a psychotherapist-patient privilege is justified under that standard. The difficult task of weighing the costs and benefits of the privilege is eased in this case by the unanimous judgment of the States that some form of psychotherapist-patient privilege is justified. The States would be unlikely to have reached that judgment if doing so would have imposed an unduly high cost on their judicial systems or failed to promise substantial social benefits. The judgment of the States that the privilege is justified provides a useful measure of the "reason and experience" in the light of which Rule 501 must be applied.

The judgment of the States is confirmed by an analysis of the costs and benefits of recognizing this privilege. Most confidential communications in the psychotherapeutic setting are unlikely to have any relevance in litigation. The test of the privilege comes when, as in this case, an incident produces both litigation and emotional and mental stress on the participants. In such cases, the absence of a privilege may lead the individuals involved to refuse psychotherapeutic treatment or to be unduly guarded in their statements during such treatment. Thus, failing to recognize the privilege would not often lead to the availability of significant new evidence, but would impose a difficult choice on those who need psychotherapeutic treatment. The burden would be particularly heavy on law enforcement officers, who are likely to suffer the emotional after-effects of traumatic incidents and who are also subject to being named as defendants in litigation resulting from such incidents.

None of the accepted exceptions or limitations to the privilege would appear to apply to the facts of this case. As the court of appeals noted, Officer Redmond was careful to preserve the privilege and did not divulge the contents of her communications to her psychotherapist throughout discovery and trial proceedings. Petitioner argues that the fact that Officer Redmond's psychotherapist was a clinical social worker—rather than a psychiatrist or psychologist—is fatal to the claim of privilege. The basis of the privilege is society's interest in the availability and benefits of psychotherapeutic treatment, however, not the particular school of treatment or discipline in which the therapist is licensed or otherwise qualified. Where, as here, state law recognizes clinical social workers as appropriate providers of psychotherapy and grants them a privilege commensurate with that of psychologists or psychiatrists, those who receive care from a clinical social worker in that State have a reasonable expectation that their communications will be confidential. Accordingly, the psychotherapist-patient privilege should apply.

ARGUMENT

CONFIDENTIAL COMMUNICATIONS MADE BY A PATIENT TO A PSYCHOTHERAPIST IN THE COURSE OF AND IN FURTHERANCE OF PSYCHOTHERAPEUTIC TREATMENT ARE PRIVILEGED UNDER FEDERAL RULE OF EVIDENCE 501

A. Under Rule 501, The Federal Courts Have The Authority To Recognize A Privilege Not Historically Recognized By The Common Law

Under Rule 501 of the Federal Rules of Evidence, "the privilege of a witness shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The general nature of the inquiry required by the Rule is reasonably clear: The historical common law privileges are generally to be recognized by the federal courts, although they should be re-examined where the rationale supporting them has become questionable. With

respect to privileges not accorded historical recognition under the common law, Rule 501 grants federal courts authority to accord them recognition if they satisfy the requirements of that Rule.

1. The federal courts are deeply committed to the principle that "the public * * * has a right to every man's evidence." *United States* v. *Bryan*, 339 U.S. 323, 331 (1950). Exceptions to broad principles of admissibility of relevant evidence "are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). Privileges are therefore "not lightly created nor expansively construed." *Ibid.* A privilege may be "accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel* v. *United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

Where an accepted common law privilege, such as the attorney-client,[1] marital,[2] or priest-penitent privilege,[3] is involved, a federal court need not re-examine in each case whether the privilege is generally justified. Even with respect to such privileges, however, Rule 501 does not "freeze" the law of privilege. As demonstrated by this

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[1] See, *e.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law"); *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888).

[2] See, *e.g.*, *Pereira* v. *United States*, 347 U.S. 1, 6-7 (1954); *Blau* v. *United States*, 340 U.S. 332, 333-334 (1951); *Wolfle* v. *United States*, 291 U.S. 7, 13-16 (1934); *Stein* v. *Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839).

[3] See, *e.g.*, *Trammel*, 445 U.S. at 53 (dictum); *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990); *Mullen* v. *United States*, 263 F.2d 275, 280 (D.C. Cir. 1958).

Court's decision in *Trammel* limiting the privilege for adverse spousal testimony, there are cases in which "reason and experience" require re-examination of the scope or incidents of even an historically excepted common law privilege.

Just as Rule 501 may on occasion require a re-evaluation of an historical common law privilege, so the Rule also may require recognition of a privilege not historically accepted by the common law. As this Court observed in *Trammel*, the language of Rule 501 "acknowledge[s] the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials," and "manifest[s] an affirmative intention not to freeze the law of privilege." 445 U.S. at 47.

2. The history of the Federal Rules of Evidence confirms that Rule 501 was not intended to preclude recognition of a privilege not historically recognized at common law. As originally formulated by the Advisory Committee and transmitted to Congress by this Court, the Federal Rules of Evidence provided that federal courts would recognize nine specific privileges (including a psychotherapist-patient privilege, see *Rules of Evidence for United States Courts and Magistrates* (*Proposed Rules*), 56 F.R.D. 183, 240-241 (1972) (Proposed Rule 504), plus whatever others were "required by the Constitution * * * or provided by Act of Congress." Proposed Rule 501, 56 F.R.D. at 230. Congress rejected that codification of the law of privilege, instead enacting Rule 501 as it currently stands. Congress did not, however, thereby intend to disapprove or foreclose the recognition of the specific privileges included in the proposed rules.

Congress's substitution of Rule 501 for the proposal transmitted by this Court was necessary, not because the proposed rules were too broad, but because they were too controversial for Congress to evaluate without unduly delaying the entire Rules project. As the Senate Committee stated, "it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and * * * the inability to agree threatened to forestall or prevent passage of an entire rules package." S. Rep. No. 1277, 93d Cong., 2d Sess. 6 (1974). See also 120 Cong. Rec. 40,891 (1974) (stating that "the privilege section of the rules of evidence generated more comment or controversy than any other section"). To permit prompt enactment of the Federal Rules of Evidence, Congress therefore decided to "leav[e] the law in its current condition," while expressly stating that the law should be " developed" by the federal courts using "the principles"—but not necessarily the precise privileges—"of the common law." S. Rep. No. 1277, *supra*, at 6 (emphasis added).

Far from expressing an intent to freeze the common law of privilege, the Committee specifically expressed its agreement with the principle that privileges not historically recognized at common law could be recognized where they satisfied "the principles of the common law as * * * interpreted * * * in the light of reason and experience." Indeed, referring specifically to the psychotherapist-patient privilege, the Committee explained:

> The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 [regarding the psychotherapist privilege] of the rule submitted by the Supreme Court. *It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme*

> *Court rules.* Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. Rep. No. 1277, *supra*, at 13 (emphasis added). See also 120 Cong. Rec. 40,891 (1974) ("Rule 501 is not intended to freeze the law of privilege as it now exists.").

3. As this Court stated in *University of Pennsylvania* v. *EEOC*, 493 U.S. 182 (1990), "although Rule 501 manifests a congressional desire not to freeze the law of privilege but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis," that flexible authority should not be exercised "expansively." *Id.* at 189 (internal quotation marks omitted); see also *Herbert* v. *Lando*, 441 U.S. 153, 176 (1979) (evidentiary privileges "disfavored"). Instead, a court called upon to recognize a privilege that was not historically recognized at common law may not recognize the claimed privilege unless its proponent can demonstrate that it satisfies the principles that have controlled the common law development of privilege, as interpreted in the light of "reason" and of the "experience" that can be gleaned from modern social and legal developments.

B. A Psychotherapist-Patient Privilege Deserves Recognition Under The Principles By Which The Common Law Has Historically Recognized Privileges

An assertion under Rule 501 of a privilege for confidential communications not historically recognized at common law can be guided by two inquiries. First, unanimous or near-unanimous recognition of a privilege by state law supports recognition of the privilege under Rule 501, especially where the States have the primary interest in regulating the relationship in which the confidential communications take place. Second, a privilege should not be recognized under Rule 501 unless the proponent of the privilege demonstrates that the benefits of the privilege outweigh its costs to the factfinding process. The results of both inquiries suggest that a psychotherapist-patient privilege should be recognized.

1. *State Law.* Where a privilege is claimed for confidential communications that take place within a relationship that is primarily governed by state law, the degree of recognition of that privilege by the States provides a useful point of departure for the analysis. For example, in *Trammel*, the Court reversed its historical understanding of the privilege for adverse spousal testimony, holding that a defendant may not preclude a willing spouse from testifying against the defendant at a criminal trial. After stating the general principles governing the analysis, the first factor the Court turned to was that "support for the privilege against adverse spousal testimony has been eroded," citing the fact that the number of States recognizing the privilege had declined over the years. 445 U.S. at 48 (citing state statutes). See also *United States* v. *Zolin*, 491 U.S. 554, 569-570 (1989) (referring to trends in state law in deciding issue under Rule 501); *United States* v. *Gillock*, 445 U.S. 360, 368 (1980) (recognizing importance of state law in this area); *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992); cf. *Branzburg* v. *Hayes*, 408 U.S. 665, 686, 689 (1972) (pre-Rule 501 case concerning claim of First Amendment reporter's privilege). The experience of the States can be important under Rule 501 for a number of reasons.

One element of the analysis under Rule 501 requires inquiry into the cost imposed by the privilege on the "normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel* v. *United States*, 445 U.S. at 50. States can generally be expected zealously to protect the fact-finding function of their courts. Accordingly, if the States have unanimously or overwhelmingly recognized a privilege, it suggests that such recognition does not unduly impair the judicial fact-finding function. With respect to the potential injury to the fact-finding process, the States' recognition of a privilege provides a useful measure of the "experience" that federal courts must consult in interpreting the "principles of the common law" under Rule 501.

State law is also of relevance in assessing the public interest that would be served by recognizing the privilege. The rationale for recognizing a privilege for confidential communications is not ordinarily to improve the functioning of the litigation process, but rather to achieve a non-litigation goal by supporting a confidential relationship in which society has a strong interest. Cf. *Trammel*, 445 U.S. at 51 (discussing rationales for several privileges); *United States* v. *Nixon*, 418 U.S. 683, 705 (1974) (executive privilege); *Wolfle* v. *United States*, 291 U.S. 7, 14 (1934) (marital privilege); *Stein* v. *Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839) (same). Where the States have primary regulatory authority over the relationship in question and have generally concluded that a privilege arising out of that relationship will achieve a social good, that judgment is entitled to respect. Conversely, if federal courts refuse to recognize a privilege so widely recognized by the States, the public interest sought to be furthered by the States—not the litigation interests of the federal courts—would be threatened. In short, the States' judgments in this area deserve careful attention.[4]

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[4] Even though Congress ultimately rejected the proposed Federal Rules regarding privilege, those proposed rules provide a useful guide to the law of privilege as of the time of their proposal. The omission of

In this case, state law cuts decisively in favor of recognition of a privilege. As the court of appeals noted, all 50 States and the District of Columbia have adopted some form of psychotherapist-patient privilege. Pet. App. 20 & n.17. See also Pet. Br. 31 ("every state and the District of Columbia appear to have adopted some protection for confidential communications with a psychiatrist or a clinical psychologist").

Petitioner contends that the experience of the States in this area is less compelling than it might seem because state laws vary with respect to the nature of protection the privilege accords and the exceptions that are recognized. Pet. 31-38. No non-constitutional privilege is without exceptions or qualifications, and the details of the laws of 50 States and the District of Columbia exhibit substantial variance. There is nonetheless substantial uniformity among the States concerning the general contours of the exceptions applicable to the psychotherapist-patient privilege.

One class of standard exceptions is based on the need for the testimony of psychotherapists where such testimony must substitute for the testimony of the patient or others who may be unable to protect their own rights. Thus, the

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a privilege from the proposed rules, standing alone, does not compel the conclusion that it should not be recognized. But such an omission "does suggest that the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism." *United States* v. *Gillock*, 445 U.S. 360, 368 (1980). See also *United States* v. *McPartlin*, 595 F.2d 1321, 1336-1337 (7th Cir.), cert. denied, 444 U.S. 833 (1979); *In re Grand Jury Proceedings*, 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977), aff'd, 570 F.2d 562 (6th Cir. 1978). The fact that the proposed rules included a psychotherapist-patient privilege, on the other hand, supports the conclusion that such a privilege was not inconsistent with the "principles of the common law."

States almost universally provide exceptions for cases involving abuse of children, incompetents, or disabled persons, and for proceedings involving hospitalization of the patient.[5] Another standard exception is essentially a codification of waiver principles; it prohibits assertion of

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[5] See, *e.g.*, Alaska Rules of Court, Rules of Evid. 504(d)(4) (1995) (hospitalization); Conn. Gen. Stat. § 52-146c(c)(4) (Supp. 1995) (child abuse, elderly abuse, abuse of disabled or incompetent); Cal. Evid. Code § 1027 (West 1995) (child victim of crime); Del. Code Ann., Unif. R. Evid. 503(d)(3) and (4) (1991) (hospitalization, child abuse); Fla. Stat. Ann. § 90.503(4)(a) (West 1979) (hospitalization); Haw. Rev. Stat. ch. 33, § 626, Rule 504.1(d)(1) (1988) (hospitalization); Idaho Rules of Evid. 503(d)(1) and (4) (1995) (child abuse, hospitalization); Ill. Ann. Stat. ch. 740, para. 110/11(i) (1993) (child abuse); Ky. St. Rev., Ky. Rules of Evid. 507(c)(1) (1994) (hospitalization); La. Stat. Ann., La. Code of Evidence Rule 510(B)(2)(e) and 510(C)(2)(f) (1995) (child abuse, elder abuse, or abuse of disabled person); Me. Rev. Stat. Ann. tit. 22, § 4015 (1992) (child abuse); Me. Rules of Evid. 503(e)(1) (West 1995) (hospitalization); Md. Cts. & Jud. Proc. § 9-109(d)(1) (1995) (hospitalization); Mass. Gen. L. ch. 112, § 129A(1) (1991) (hospitalization); Mich. Comp. Laws Ann. § 330.1750(3)(b) (West 1992) (hospitalization); Minn. Stat. § 595.02, subd. 2 (1988) (abuse or neglect of minor); Neb. Rev. Stat. § 27-504(4)(a) and (d) (Supp. 1994) (hospitalization, injuries to children, incompetents, or disabled persons); Nev. Stat. ch. 640, § 1995 (hospitalization, child abuse or neglect); N.M. Stat. Ann., Rules of Evid., Rule 11-504(D)(1) (1994) (hospitalization); N.C. Gen. Stat. § 8-53.3 (Supp. 1994) (abuse or neglect of child or disabled adult); N.D. Court Rules Ann., Rule of Evid. 503(d)(1) (1994) (hospitalization); Okla Stat. tit. 12, § 2503(D)(1) (1992) (hospitalization); R.I. Gen. Laws § 5-37.3-4(4) (Supp. 1994) (child abuse); S.D. Codified Laws Ann. § 19-13-9 (1995) (hospitalization) and § 26-8A-15 (1992) (child abuse or neglect); Tenn. Code Ann. § 37-1-411 (1991) (child abuse); Utah Court Rules Ann., Rules of Evid. 506(d)(2) (1995) (hospitalization); Vt. Stat. Ann. Rules of Evid. 503(d)(1), (5), and (7) (1983 & Supp. 1995) (hospitalization, child abuse); Va. Code Ann. § 8.01-400.2 (Michie 1992) (child abuse); Wis. Stat. § 905.04(4)(a) and (e) (1993 & Supp. 1995) (hospitalization, child abuse); Wyo. Stat. § 33-27-123(a)(i) and (v) (Supp. 1995) (abuse or neglect of children, the elderly, or the disabled).

the privilege where the patient's mental condition or the psychotherapeutic relationship is an element of the patient's claim or defense.[6] Other exceptions are based on the absence of a genuine psychotherapist-patient relationship, such as the common exception for court-ordered examinations.[7] Finally, many States recognize an exception for testimony regarding an intent to commit future crimes,[8] parallel to the similar exception to the attorney-client privilege.[9] See *United States* v. *Zolin*, 491 U.S. 554, 562-575 (1989).

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[6] See, *e.g.*, Alaska Rules of Court, Rules of Evid. 504(d)(1) (1995); Cal. Evid. Code § 1016 (West 1995); Colo. Rev. Stat. Ann. § 13-90-107(3) (Supp. 1995); Conn. Gen. Stat. § 52-146c(c)(2) (Supp. 1995); Del. Code Ann., Unif. R. Evid. 503(d)(3) (1991); Fla. Stat. Ann. § 90.503(4)(c) (West 1979); Haw. Rev. Stat. ch. 33, § 626, Rule 504.1(d)(3) (1988); Idaho Rules of Evid. 503(d)(3) (1995); Ill. Ann. Stat. ch. 740, para. 110/10(a)(1) (1993); Iowa Code § 622.10 (Supp. 1995); Ky. St. Rev., Ky. Rules of Evid. 507(c)(3) (1994); La. Stat. Ann., La. Code of Evidence Rule 510(B)(2)(c) (1995); Me. Rules of Evid. 503(e)(3) (West 1995); Md. Cts. & Jud. Proc. § 9-109(d)(3)(i) (1995); Mass. Gen. L. ch. 233, § 20B(c) (Supp. 1995); Mich. Comp. Laws Ann. § 330.1750(3)(a) (West 1992); Neb. Rev. Stat. § 27-504(4)(c) (Supp. 1994); 1995 Nev. Stat. Ch. 640, § 19; N.M. Stat. Ann., Rules of Evid., Rule 11-504(D)(3) (1994); N.D. Court Rules Ann., Rule of Evid. 503(d)(3) (1994); Ohio Rev. Code Ann. § 4732.19 (1994) and § 2317.02(B)(1)(a)(iii) (1995); Okla Stat. tit. 12, § 2503(D)(3) (1993); Or. Rev. Stat. § 40.230 Rule 504(4)(b)(B) (1993); S.D. Codified Laws Ann. § 19-13-11 (1995); Tex. R. Civ. Ev. r. 510(d)(5) (West 1995); Utah Court Rules Ann., Rules of Evid. 506(d)(1) (1995); Vt. Stat. Ann. Rules of Evid. 503(d)(3) (1983); Wis. Stat. § 905.04(4)(c) (1993); Wyo. Stat. § 33-27-123(a)(vi) (Supp. 1995).

[7] See, *e.g.*, Alaska Rules of Court, Rules of Evid. 504(d)(6) (1995); Cal. Evid. Code § 1017 (West 1995); Conn. Gen. Stat. § 52-146c(c)(1) (Supp. 1995); Del. Code Ann., Unif. R. Evid. 503(d)(2) (1991); Fla. Stat. Ann. § 90.503(4)(b) (West 1979); Haw. Rev. Stat. ch. 33, § 626, Rule 504.1(d)(2) (1988); Idaho Rules of Evid. 503(d)(2) (1995); Ill. Ann. Stat. ch. 740, para. 110/10(a)(4) (1993); Ky. St. Rev., Ky. Rules of Evid. 507(c)(2) (1994); La. Stat. Ann., La. Code of Evidence Rule 510(B)(2)(f) (1995); Me. Rules of Evid. 503(e)(2) (West 1995); Md. Cts. & Jud. Proc. § 9-109(d)(2) (1995); Mass. Gen. L. ch. 233, § 20B(b) (1986); Mich. Comp. Laws Ann. § 330.1750(3)(e) (West 1992); Neb. Rev. Stat. § 27-504(4)(b) (Supp. 1994); 1995 Nev. Stat. Ch. 640, § 19; N.M. Stat. Ann., Rules of Evid., Rule 11-504(D)(2) (1994); N.D. Court Rules Ann., Rule of Evid.

503(d)(2) (1994); Okla Stat. tit. 12, § 2503(D)(2) (1993); Or. Rev. Stat. § 40.230 Rule 504(4)(a) (1993); S.D. Codified Laws Ann. § 19-13-10 (1995); Tex. R. Civ. Ev. r. 510(d)(4) (West 1995); Utah Court Rules Ann., Rules of Evid. 506(d)(3) (1995); Vt. Stat. Ann. Rules of Evid. 503(d)(2) (1983); W. Va. Code § 27-3-1(b)(1) and (2) (1992); Wis. Stat. § 905.04(4)(b) (1993); Wyo. Stat. § 33-27-123(a)(vii) (Supp. 1995).

[8] Alaska Rules of Court, Rules of Evid. Rule 504(d)(2) ("crime or fraud") (1995); Cal. Evid. Code § 1018 (West 1995); Conn. Gen. Stat. § 52-146c(b)(3) (Supp. 1995) ("risk of imminent personal injury * * * or risk of imminent injury to * * * property"); Ill. Ann. Stat. ch. 740, para. 110/11(vi) (1993) (specific threats of violence); La. Stat. Ann., La. Code of Evidence Rule 510(B)(2)(e) and 510(c)(2)(b) (1995); Mass. Gen. L. ch. 112, § 129A(2) and (3) (1991) (threat to kill or inflict serious injury or clear and present danger that patient will kill or inflict serious injury); 1995 Nev. Laws Ch. 640, § 19 ("immediate threat that the patient will harm himself or other persons"); R.I. Gen. Laws § 5-37.3-4(4) (Supp. 1994) (where an individual "is in danger from a patient"); S.C. Code Ann. § 19-11-95(C)(3) (Supp. 1994) ("intention * * * to commit a crime or harm himself"); W. Va. Code § 27-3-1(b)(4) (1992) "[t]o protect against a clear and substantial danger of imminent injury"); Wyo. Stat. § 33-27-123(a)(iv) (Supp. 1995) ("immediate threat of physical violence against a readily identifiable victim"). See also *United States* v. *Snelenberger*, 24 F.3d 799, 802 (6th Cir. 1994) (relying in part on state law exception for threats of future crimes to apply similar exception under Rule 501), cert. denied, 115 S. Ct. 433 (1994). Cf. 42 U.S.C. 290dd-2(b)(2)(C) (Supp. V 1993) (confidentiality of treatment records in federal substance abuse programs may be abrogated if there is a "need to avert a substantial risk of death or serious bodily harm").

[9] A number of States simply provide that the psychotherapist-patient privilege shall be placed on the same basis as the attorney-client privilege. See, *e.g.*, Ala. Code § 34-26-2 (1991); Ariz. Rev. Stat. Ann. 32-2085(A) (1992); Ark. Code Ann. § 17-96-105 (Michie 1992); Ga. Code Ann. § 43-39-16 (Michie 1994); Kan. Stat. Ann. § 74-5323 (1992);

Smaller numbers of States recognize a variety of exceptions in other specific categories of cases.[10] A very large number of State statutes and evidence codes, however, fit reasonably well within the model outlined in the previous paragraph. The unanimity among the States on the basic principle that some form of psychotherapist-patient privilege should be recognized, coupled with the substantial uniformity among a large number of States on the major exceptions that are applicable, provides strong support for the argument that "reason and experience" support recognition of a psychotherapist-patient privilege.

2. *Balancing of costs and benefits.* The ultimate question under Rule 501 is whether the proponent of the privilege can establish that the values served by its recognition outweigh the harm that the litigation process will suffer through the unavailability of otherwise

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Mont. Code Ann. § 26-1-807 (1993); N.H. Rev. Stat. Ann. § 330-A:19 (1995); N.J. Rev. Stat. § 45:14B-28 (1995); N.Y. Civ. Prac. L. & R. § 4507 (McKinney 1992); 42 Pa. Cons. Stat. Ann. § 5944 (Supp. 1995); Tenn. Code Ann. § 63-11-213 (1990); Wash. Rev. Code § 18.83.110 (Supp. 1995). Those statutes would thereby appear to incorporate most of the exceptions discussed in text.

[10] A number of States recognize an exception for some or all criminal cases. See, *e.g.*, D.C. Code Ann. § 14-307(b)(1) (1995) ("in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon, a human being, and the disclosure is required in the interests of public justice"); Ill. Ann. Stat. ch. 740, para. 110/10(a)(9) (1993) (homicide cases); Ind. Code § 25-33-1-17(1) (1995) (homicide trials); Neb. Rev. Stat. § 27-504(4)(e) (controlled substances offenses); R.I. Gen. Laws § 5-37.3-4(4) and (19) (Supp. 1994) (attempting to obtain narcotic drugs from health care provider, medicaid fraud); Tex. R. Crim. E. rules 501-510 (West 1995) (no provision for psychotherapist-patient privilege in criminal cases); Va. Code Ann. § 8.01-400.2 (Michie 1992) (providing for privilege "in any civil action"); Wis. Stat § 905.04(4)(d) (1993) (homicide cases).

probative evidence. In an influential formulation, Dean Wigmore stated that requirement as follows:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (b) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between the parties.
>
> (c) The *relationship* must be one that in the opinion of the community ought to be sedulously *fostered.*
>
> (d) The *injury* that would inure to the relationship by the disclosure must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 J. Wigmore, *Evidence* § 2285, at 527 (McNaughton rev. 1961).

(i). There is little doubt that the first Wigmore criterion is satisfied here: communications made in the course of and in furtherance of psychotherapy "originate in a confidence that they will not be disclosed." Empirical evidence strongly suggests that patients believe that what they tell their psychotherapists will be held in the strictest confidence, and the unanimous adoption by the States of a psychotherapist-patient privilege demonstrates that that belief is reasonable.[11] As the Advisory Committee that drafted Proposed Rule 504 commented:

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule * * * , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client.

56 F.R.D. 183, 242 (1972).

(ii). The psychotherapist-patient privilege also satisfies Wigmore's second requirement—that such confidentiality generally is "essential * * * to the full and satisfactory" pursuit of the therapy. Unlike the treatment of physical illnesses and conditions, where chemical or other tests and procedures may be sufficient both to diagnose an illness and treat it, the practice of psychotherapy relies heavily on disclosures of information by the patient for both diagnosis and treatment.[12] Moreover, given the nature of the mental and emotional conditions that psychotherapists treat, "[d]isclosure of communications to psychotherapists * * * would frequently be embarrassing to the point of mortification for the patient." *In re Doe*, 964 F.2d at 1328; see also *In re Zuniga*, 714 F.2d 632, 639-640 (6th Cir.) ("The essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure."), cert. denied, 464 U.S. 983 (1983). Finally, a psychotherapeutic patient may often feel less urgency regarding the need to obtain therapy than many patients who are injured or physically ill. Uncertainty about whether disclosures will remain confidential may therefore have a substantive effect on the willingness of individuals to seek psychotherapeutic treatment and to be completely candid in the course of that treatment. *In re Zuniga*, 714 F.2d at 638. The importance of confidentiality to the psychotherapist-patient relationship is comparable to its importance to the priest-penitent or attorney-client relationship, both of which benefit from privileges under Rule 501.

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[11] See, *e.g.*, Appelbaum, Kapen, Walters, Lidz, & Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. of the Amer. Acad. of Psychiatry and the Law 109, 110 (1984) (reviewing prior studies).

[12] As the Sixth Circuit has observed, "[m]any physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him." *In re Zuniga*, 714 F.2d 632, 638 (6th Cir.) (quoting *Taylor* v. *United States*, 222 F.2d 398, 401 (D.C. Cir. 1955)), cert. denied, 464 U.S. 983 (1983); *Lora* v. *Board of Educ.*, 74 F.R.D. 565, 571 (E.D.N.Y. 1977) ("Essential to psychotherapy are confidential personal revelations about matters which the patient is normally reluctant to discuss."); see also *In re Doe*, 964 F.2d 1325 at 1328.

(iii). Petitioner does not dispute that the third Wigmore criterion—whether the psychotherapist-patient relationship is one "that in the opinion of the community ought to be sedulously fostered"—is satisfied. Society has an enormous interest in the relief of mental and emotional distress and illness, and psychotherapy is an accepted means to that end in many situations.

(iv). That leaves the fourth, and most significant, criterion—whether the "injury that would inure to the relationship by the disclosure" is "greater than the benefit thereby gained for the correct disposal of litigation." The uniform view of the States that a psychotherapist-patient privilege merits recognition should carry significant weight in making the judgment that this criterion is satisfied. There are, however, additional considerations that also support this conclusion.

The true costs and benefits of recognizing the privilege become apparent in cases like this one, where a traumatic incident or event imposes mental and emotional stresses on a participant and also may reasonably be expected to

lead to litigation. In that context, the failure to recognize a privilege can exact a heavy cost, because participants may often be discouraged from seeking psychotherapeutic treatment because of the absence of a privilege. In such instances, the failure to recognize the privilege would not materially assist the fact-finding function of the courts, since the very evidence that is sought—the patient's confidential communications to the psychotherapist in furtherance of the therapeutic relationship—would be lost if the confidential relationship is not formed in the first place.

A useful illustration is provided by law enforcement agents, such as Officer Redmond, who become involved in incidents such as the shooting in this case. Agents involved in such incidents frequently experience emotional and psychological stress and turmoil.[13] The difficulties can become severe enough to affect their ability to function effectively, both in their private lives and on the job.[14] Psychotherapeutic treatment and counseling can be helpful to agents in that situation.

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[13] Among the symptoms of posttraumatic stress disorder are reexperiencing of the traumatic incident and intense psychological distress when the individual is exposed to events that recall the traumatic incident; amnesia; feelings of estrangement and detachment; difficulty sleeping and recurrent nightmares; irritability; outbursts of anger; difficulty concentrating or completing tasks; and self-destructive and impulsive behavior. See American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) 424-429. Those symptoms are frequently encountered by law enforcement agents involved in traumatic incidents. See generally Federal Bureau of Investigation, U.S. Dep't of Justice, *Critical Incidents in Policing* (*Critical Incidents*) 85-94, 144-146, 161-162, 251-253, 269-273 (rev. 1991) (describing symptoms in police officers); see also *id.* at 359-362.

[14] Studies from the 1970's showed that up to 95% of the police officers involved in shooting incidents had left police work within five years. See Michael J. McMains, *The Management and Treatment of Post-*

Traumatic incidents may also lead to litigation. Agents involved in such incidents thus often reasonably anticipate being named as defendants in subsequent *Bivens*, Section 1983, or tort actions. If the agents become aware that statements they make to a psychotherapist in the course of treatment would be discoverable in litigation and perhaps admissible in court, they may be dissuaded from seeking such treatment altogether.[15] And if they do obtain such treatment, their statements to their psychotherapists may be sufficiently self-censored to render successful treatment difficult or impossible.

Law enforcement agencies frequently play an important role in referring agents involved in traumatic incidents to counseling. Most of the federal law enforcement agencies, for example, have employee assistance programs through which, *inter alia*, they identify agents who have suffered emotional or psychological difficulties as a result of traumatic incidents and who would be likely to benefit

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shooting Trauma: Administration and Programs, in *Critical Incidents* 191. See also *Critical Incidents* 143 (70% out of law enforcement within five years). The experience of the federal law enforcement agencies is that that number can be dramatically reduced, with appropriate agency support that includes, where appropriate, psychotherapeutic counseling. See *id.* at 191-195; see also Nancy Bohl, *The Effectiveness of Brief Psychological Interventions in Police Officers After Critical Incidents*, in *Critical Incidents* 31-35; James T. Reese, *Justifications for Mandating Critical Incident Aftercare*, in *Critical Incidents* 292-293 (discussing need for mandatory psychotherapeutic intervention after critical incidents).

[15] See Chris Dunning, *Mitigating the Impact of Work Trauma: Administrative Issues Concerning Intervention*, in *Critical Incidents* 77 (discussing need for confidentiality in psychotherapeutic treatment of officers involved in traumatic incidents).

from psychotherapeutic treatment or counseling.[16] Some agencies mandate referral to a psychotherapist after a traumatic incident. If no privilege is recognized, the agencies may feel themselves obligated to inform agents that, although psychotherapy is encouraged or required, disclosures to the therapist will be made at the risk of discovery and evidentiary use in ensuing litigation. Even if agencies do not bring that information to the attention of their agents, a single highly publicized case would be likely to have the same effect. Agents, fearing subsequent litigation, might consequently be unwilling to undertake psychotherapy where indicated or, if they did enter psychotherapy, to communicate with their therapists with sufficient candor to obtain the benefits of the therapy.

Essentially the same calculus would appear to apply in a variety of other situations outside the law enforcement context, in which a particular, traumatic incident results not only in the likelihood of litigation, but also in stresses on the participants that indicate a need for psychotherapeutic treatment. In situations like those, the absence of a privilege would impose a substantial cost on the participants and on society, while making very little new evidence available in subsequent litigation.

C. The Psychotherapist-Patient Privilege Extends To The Facts Of This Case

1. With a single exception, this case presents a core application of the psychotherapist-patient privilege. Respondents seek to discover and to introduce in evidence

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[16] Among the federal law enforcement agencies that have active employee assistance programs that make voluntary or mandatory referrals to psychotherapists are the Federal Bureau of Investigation, the Drug Enforcement Administration, the Immigration and Naturalization Service, the Secret Service, the Customs Service, the Bureau of Alcohol, Tobacco, and Firearms, and the Internal Revenue Service.

statements that Officer Redmond made to her psychotherapist in the course of psychotherapeutic treatment. None of the common exceptions to the privilege appear to apply.[17]

Accordingly, as the court of appeals noted, this case does not require the court to "speculate as to what situations would call for the abrogation of this privilege." Pet. App. 22. When such situations do arise, the contours of the privilege and its exceptions should be worked out through relatively clear categorical rules, with a "fail-safe" exception for other extraordinary circumstances justifying abrogation of the privilege. As this Court explained in *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981) with respect to the attorney-client privilege, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." The result of a privilege of uncertain scope would be to "place the policy of protecting open and legitimate disclosure between [psychotherapists] and [patients] at undue risk." *United States* v. *Zolin*, 491 U.S. at 571. The solid basis in reason and experience provided by the States' experience with the privilege and its exceptions can be very useful in developing appropriately clear categorical exceptions and limitations.

2. The single respect in which this case is not a core application of the privilege is that Officer Redmond sought psychotherapeutic treatment from a clinical social worker, not a psychiatrist or psychologist. See Pet. Br. 39-40. The basis of the privilege, however, is society's interest in the availability and benefits of psychotherapeutic treatment, not the particular school of treatment in which the psychotherapist is licensed or otherwise qualified. Some studies have shown that clinical social workers perform a very large percentage of the psychotherapeutic treatment that takes place in this country, and that their work is concentrated in rural areas and among those who are unlikely to be able to afford the services of psychiatrists or psychologists.[18] Limiting the privilege to those licensed as psychologists or psychiatrists would impose an unjustified and unnecessary burden on those least able to afford it.[19]

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[17] Like all other privileges, the psychotherapist-patient privilege would be subject to waiver principles. See *United States* v. *Premises Known As 281 Syosset Woodbury Road*, 1995 WL 737466, at *5 (2d Cir. 1995). In this case, Officer Redmond took steps to protect her privilege. Although she testified concerning the duration and timing of the therapy, see J.A. 100-101, the court of appeals correctly noted "that the psychotherapist/patient privilege protects only *confidential communications*." Pet. App. 21 n.18.

That does not mean that confidential communications in the course of psychotherapeutic treatment by a clinical social worker—or any other person claiming to administer psychotherapy—would in every instance qualify for the privilege. The privilege should not be applied in contexts in which its rationale fails. The key question is whether the professional was performing genuine psychotherapy at the time of the communication, and whether the communications at issue were reasonably believed by all participants to be confidential.

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[18] See, *e.g.*, Comment, *The Psychotherapist Privilege: Are Some Patients More Privileged Than Others?*, 10 Pac. L.J. 801, 804 (1979); Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Calif. L. Rev. 1050, 1050 (1973).

[19] As argued above, the availability of a privilege may affect individuals' willingness to seek psychotherapy in at least some types of cases. There is a danger that recognition of certain professional categories and not others would serve to give an unjustified competitive advantage to professionals in the favored categories.

In Illinois, social workers are licensed to provide "mental health services for the evaluation, treatment, and prevention of mental and emotional disorders," see Pet. App. 5 n.3, and state law clearly extends the psychotherapist-patient privilege to treatment by clinical social workers, see Pet. App. 21. In those circumstances, Officer Redmond and her clinical social worker reasonably believed that Redmond's communications would be confidential, and there is a basis for recognizing the privilege. In places where state law does not accord that recognition to clinical social workers or render psychotherapeutic communications with a social worker privileged, there would be less basis to conclude that the patient had a reasonable expectation that the patient's confidences would be protected. In a case arising in such a State, there may therefore be no basis to claim a federal court privilege; there would be little reason for a federal court to attempt to protect the confidentiality of a relationship that the State itself has not attempted to protect. Cf. *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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I. INTEREST OF AMICI

Amici Joseph E. Lifschutz, M.D., and George R. Caesar, M.D. are psychiatrists in private practice who for decades have had a special concern about the importance of confidentiality in psychotherapy. Both men have had occasion to take particularly firm stands on that subject. Each has taken a principled stand in support of the tenet that in order for patients to be treated effectively in psychotherapy, absolute confidentiality is necessary, and that to disclose patient confidences even under statutory compulsion would fundamentally violate their valued social function as physicians and healers. Dr. Lifschutz and Dr. Caesar were the protagonists in two leading cases which addressed the need for a psychotherapist-patient evidentiary privilege and its constitutional dimensions. *In re Lifschutz*, 2 Cal.3d 415, 85 Cal. Rptr. 829, 467 P.2d 557 (1970); *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976) (see especially opinion of Hufstedler, J., concurring and dissenting). Each of them was ordered by a court of law to testify about his patient, refused, and served a brief term for contempt of court, neither having any interest of his own in the matter other than adherence to basic principles of their profession. By their courage, Drs. Lifschutz and Caesar hoped to demonstrate that the professional principles of their profession, one which is clearly essential to the well-being of humankind, are entitled to as much consideration as is the rule of law, and that they warrant the law's accommodation.

The *amicus* San Francisco Psychoanalytic Institute and Society is a teaching institution which trains psychoanalysts. As such, it has a particular concern that confidentiality in psychoanalysis and psychotherapy be properly understood and that the law of privilege give full and proper consideration to the treatment needs of patients receiving psychotherapy and to the betterment of the patients' mental health.

Amici believe that other interested parties will fully develop the legal issues before the Court. They are grateful for the opportunity to emphasize here some of the medical concerns that establish a particular need for confidentiality -- and thus, for privilege -- in order to allow patients to benefit from psychotherapy. *Amici* will also point out that psychotherapy is not a truth-finding activity and that what a patient may say in psychotherapy involves feelings, not facts. The therapist's only purpose in listening is the relief of emotional symptoms and the improvement of the patient's mental health. The ascertainment of objective truth about events in the patient's life, the goal of evidence in the legal system, is not a goal or purpose of psychotherapy.

II. ARGUMENT

A. Introduction.

Every judge and lawyer who has worked in the field of psychotherapeutic confidentiality is aware of the passage by Chief Judge Henry Edgerton which has echoed down through the years:

> [A] psychiatrist must have his patient's confidence or he cannot help him. "The psychiatric patient confides more utterly than anyone else in the world. . . . he lays bare his entire self, his dreams, his fantasies, his sins and his shame. . . .It would be too much to expect them to do so if they knew that all they say - and all that the psychiatrist learns from what they say - may be revealed to the whole world from a witness stand."

Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955), *quoting* M. Guttmacher & H. Weihofen, *Psychiatry and The Law* 272 (1952).

This passage has been repeated in other cases examining the issue of confidentiality in psychotherapy, notably in *In re Lifschutz*, 2 Cal.3d 415, 431, 85 Cal. Rptr. 829, 467 P.2d 557 (1970), and in the case below, *Jaffee v. Redmond*, 51 F.3d 1346 (7th Cir. 1995).[1]/ A main purpose of this brief is to assist the Court by furnishing it material that explains the truth of this passage and the importance of such confidences in the healing process of psychotherapy.

It is important to note that psychotherapy is but one branch of mental health care. The term "mental health care" is used here to encompass every kind of professional assistance to people with mental and emotional difficulties, no matter which professional may provide it. There is of course a hierarchy of care providers, ranging from physicians specializing in mental health called psychiatrists to clinical psychologists, licensed clinical social workers, marriage and family child counselors and many others.[2]/ These mental health workers use a large variety of means to alleviate their patients' suffering, including (among others) commitment to secure wards, the prescription of psychoactive drugs, short-term and long-term psychotherapy and psychoanalysis. While ***all*** aspects of mental health treatment should be protected by the privilege, the analytical reasons and needs for the privilege are especially important to psychotherapy and psychoanalysis.

1/ *See also, e.g., In re Zuniga*, 714 F.2d 632, 638 (6th Cir. 1983); *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F.Supp. 1028, 1038 (D. Haw. 1979); *Lora v. Board of Educ. of New York*, 74 F.R.D. 565, 571 (E.D.N.Y. 1977).

2/ California Evidence Code §1010 is typical of statutes dealing with psychotherapist-patient privilege in listing the various kinds of mental health workers whose therapy is protected by that privilege. It includes in that list psychiatrists, psychologists, clinical social workers, school psychologists, marriage, family and child counselors, registered nurses, and various assistants to some of the positions listed above.

In those areas such as medications visits, where the patient reveals few confidences to the clinician, the reason for the privilege is the same as that for the age-old physician-patient privilege: to encourage the patient to seek help while protecting against unnecessary disclosure of matters of great personal embarrassment, such as the symptoms of a psychosis, a history of confinement in a mental hospital and the like. *See, e.g., Buford v. Howe*, 10 F.3d 1184 (5th Cir. 1994); *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 499 N.E.2d 952, 102 Ill. Dec. 172 (Ill. App. Ct. 1986), *cert. denied*, 483 U.S. 1007 (1987). But the **nature and quality** of the therapeutic process in psychotherapy and in psychoanalysis is different and unique, and there is accordingly an additional and qualitatively different and more far-reaching reason why what the patient tells or the clinician hears and knows as the result of such psychotherapy should be protected through the recognition of a psychotherapist-patient privilege. *Lora v. Board of Educ. of New York*, 74 F.R.D. 565, 575 (E.D.N.Y. 1977).

It may be helpful to distinguish *privacy* from *confidentiality*, as these terms are discussed in the professional literature. The concept of privacy in psychotherapy embraces the idea of limiting the access of others to one's mind, including information about the self that is contained in dreams, fantasies, thoughts, and beliefs. M. Smith-Bell & W. Winslade, *Privacy, Confidentiality, and Privilege in Psychotherapeutic Relationships*, 64 Amer. Journal of Orthopsychiatry 180, 181 (1994). Thus, privacy is the patient's personal and individual right to keep personal matters from public intrusion. *Confidentiality*, on the other hand, characterizes and identifies the physician's treatment of communications made to the therapist within the context of a patient-therapist relationship. Once private information has been disclosed to a therapist with an expectation that such information normally will not be disclosed to third parties, it becomes confidential as to the clinician who heard it. *Id.* at 183. This expectation on the patient's part is essential to the therapeutic process, as we will explain.

B. The Nature of Psychotherapeutic Confidences

A basic tenet of psychotherapy (at least for adult patients) is the requirement that therapist and patient enter into a joint endeavor of consenting adults in what psychotherapists actually call a *therapeutic* or *working alliance*. H. Kaplan & B. Sadock, *Synopsis of Psychiatry* 573 (1991). Both parties commit themselves to exploring the patient's most deep-seated, even unconsciously lodged concerns, to establishing an absolute mutual trust, and to cooperating with each other to achieve a realistic goal of the cure or amelioration of the patient's symptoms, illness or distress. In fact, it is generally recognized that this very close confidential quality of the psychotherapist-patient relationship is of equal, if not greater importance to successful treatment than what is actually said during treatment. G.S. Truant & J.G. Lohrenz, *Basic Principles of Psychotherapy*, 47 Amer. Journal of Psychotherapy 8, 25 (1993).

Full, open and honest communication is essential to fostering an effective therapeutic relationship. G.S. Truant & J.G. Lohrenz, *supra*, at 16. Clinicians learn to encourage their patients to talk in detail about emotionally significant aspects of their experiences, expressing the patients' feelings and in more extensive therapy, also their fantasies. *Id.* at 13. Invariably, this means that their patients will talk -- at length and on occasion in pain -- about the patients' thoughts, feelings and behavior and how they experience themselves and their key relationships, including the one with the therapist. *Id.* Building this trust -- called the therapeutic alliance -- is one of the first tasks the clinician faces. Therapeutic relationships are often tentative and fragile until the patient can come to trust the therapist with intimate details of the patient's life and feelings. *Id.* at 184.

This strong relationship of trust is crucial to the psychotherapeutic technique of *free association* -- the patient's verbalizing everything that comes to mind without censorship, regardless of the patient's belief in the thought's unacceptability, unimportance or capacity to embarrass or shame. H. Kaplan & B. Sadock, *supra*, at 573. Free association is a *sine qua non* of any extensive psychotherapy. This process may take months or longer before the patient will bring up in therapy deeply hidden psychological fears and traumas, with which the clinician then helps the patient come to terms. Thus is the patient helped to better mental health.

Without a promise of complete confidentiality, the patient would become very much more reluctant to bring this hidden material to light. It is thus the psychotherapist's function, in part, to analyze the freely associated material as it relates to the patient's cognitive processes and to any neuroses or psychoses from which the patient may suffer. This unique process generates statements and revelations which may be wholly or partially distorted or even imaginary -- i.e., fictitious -- and thus often particularly unsuitable for the truth-finding function of legal process.

C. There Is A Special Need For Confidentiality In Psychotherapy

The Hippocratic Oath, sworn by physicians since ancient times, states in part, "And whatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets." 1 *Hippocrates* 301 (W. H. Jones trans. 1923), *reprinted in* S. Reiser, *Ethics In Medicine: Historical Perspectives And Contemporary Concerns* 5 (1977). Hippocrates's injunction has special meaning in the field of psychotherapy: "[t]he principle of confidentiality is of unique importance in psychoanalysis because some of the information actively sought in the relationship has been unconscious; that is, what is revealed is often not acceptable to the patient." *Psychoanalytic Terms and Concepts* 44 (B. Moore & B. Fine eds. 1990). As one might expect, it is often difficult to help a patient uncover, understand, and accept this unconscious information, and it cannot be done without the patient's cooperation. Unless a patient trusts that these intensely personal expressions will not be shared with others, it is unlikely that the patient will cooperate fully in the therapy. M. Smith-Bell & W. Winslade, *supra*, at 180. "The disclosure of one's self to one's self can be difficult enough. There is usually some increment of displeasure from the necessary psychic exposure to the analyst. There should be no danger of further distress from the possibility of the analyst's exposure of the patient to anyone else." A. Watson, *Levels of Confidentiality in the Psychoanalytic Situation*, 20. J. Amer. Psychoanalytic Assn. 156, 157 (1972).

1. Without confidentiality, most patients would forego treatment

If a psychotherapist-patient privilege were widely denied, the practice of psychotherapy would be damaged in at least two major ways. The first is implied by the unique reasons underlying the necessity for the privilege. During therapy, a patient is encouraged to say whatever comes to his mind, without self-censorship. "In order to do this, he must trust that the clinician will not take him at his word, but instead will regard the expression of thought as the means to liberate unconscious ideas, memories and feelings that contribute to his mental suffering and disturbed relations." C. Bollas & D. Sundelson, *The New Informants* 61 (1995). If the patient cannot trust that his expressions will be used only in this way--because he is aware, at some level, that the psychotherapist may at some future time be compelled to repeat those expressions outside the therapeutic context--and therefore feels free to discuss only part of his thoughts, "the entire procedure would come to a halt. It is not possible to be unconsciously selective in this way." Id.

2. Without privilege, psychotherapists would be unable to provide proper treatment

In addition to the effect that denial of privilege would have on patients, less obvious but no less insidious is the deleterious effect that such a denial would have on psychotherapists. The psychotherapist is very much an active participant in the therapy session, even when she is not speaking. The psychotherapist must allow herself to explore the same psychic terrain as the patient. The therapist serves as a "blank screen" for the reception of the patient's experience and psychic stresses. The patient unconsciously understands how completely receptive the analyst is being, and is thus emboldened to express more fully her internal world. Id. at 88. However, when the psychotherapist is concerned--consciously or unconsciously--that the therapist may have to disclose to third parties the words the patient has used to express her inner world, or otherwise violate the patient's confidence, the analyst's "screen" is no longer blank, and the resulting distraction prevents the therapist from being fully receptive to the patient's inner world. Id. at 89-90.[3/]

D. Statements Made During Therapy Do Not Generally Aid The Truth-Seeking Process

A common objection to the establishment of *any* testimonial privilege is that it impedes access to relevant evidence and therefore obstructs the truth-finding process. Indeed, the petitioner has strenuously advanced the position that recognition of a psychotherapist-patient privilege would exclude "crucial evidence." Brief for Petitioner at 21-25.

[3/] This argument should not be taken as a claim that the therapist is entitled to assert a privilege for her own benefit. It is the patient whose therapy is impeded if the therapist listens to the patient with one ear cocked, so to speak, to be alert for an outside intrusion into the intimacies of the therapeutic process.

Whatever the force of this objection when applied to other privileges, in the context of a psychotherapist-patient privilege it is most misleading and should carry very little weight. The argument assumes that the evidence shielded by the privilege is accurate, truthful evidence, whose consideration will perforce aid the search for truth. However, the nature of statements made by patients to psychotherapists counsels that admission of such statements might actually degrade the truth-finding process. This is so because statements made by patients to psychotherapists are quite often not "true" in the sense we commonly understand the term.

As we have seen, the object of psychotherapy is to allow the patient to "work through" her secret and even unconscious feelings, by speaking them out loud in the intimate and nonjudgmental environment of a therapy session. It is not at all uncommon that a patient will express deeply buried, socially unacceptable assertions to the therapist which may sound like facts to an outside listener -- "my father abused me as a child;" "I killed my brother" -- but which the therapist understands may be expressions of deeply buried fears, anxieties or other feelings, not "true" in the truth-finding sense at all.

Thus while of course we have no knowledge of what Ms. Redmond may have said in her many therapy sessions with her therapist, it is entirely conceivable that in agony about having taken a human life, she might more than once have stated there, *as a fact,* that she could have conducted herself in ways which would have averted the tragedy. This type of self-reproach is to be expected in working through the stress and grief of such a tragic event, but no one should mistake it -- if indeed it was said -- as the speaker's objective, truthful description of the actual events. It may or may not be that; but one can be certain that there would be little reason for it to have been given to the therapist as a statement of the objective truth.

The American Psychiatric Association's standard and comprehensive textbook, *Treatments of Psychiatric Disorders*, describes a case history analogous to that found in this case, and thereby provides an example of how statements made in therapy may not represent "truth" as it is sought in a courtroom. An experienced lifeguard was faced with an exceptionally busy summer day. The demands on his attention mounted to the point where he realized he could not be sure that everyone was safe. As a result, "[h]e blew his whistle and ordered the pool cleared. To his horror there was an inert body at the bottom of the pool." American Psychiatric Association, 3 *Treatments of Psychiatric Disorders* 2078 (1989). The lifeguard dove into the pool, brought out a small boy, and attempted to resuscitate him. He was unsuccessful: the child was dead. Id.

After the tragedy, the lifeguard began to have nightmares, seeing the child's face blurred as if under water, or as it appeared before the attempted resuscitation. The lifeguard eventually entered therapy for treatment of post traumatic stress disorder. Id. During the course of his therapy, "an important and repetitive activity was to attempt to disentangle the realistic aspects of his responsibility as a lifeguard for the safety of everyone in the pool *and his fantasy elaborations of reasons why he was terribly guilty*." *Id.* at 2078-79 (emphasis added). In other words, the lifeguard told the therapist that it was all his fault the child died. But that wasn't "true" in an objective sense. The lifeguard's statements to that effect were the "fantasy elaborations" of a mind temporarily unable to come to grips with a terrible tragedy. The psychotherapist recognized them as such, and used them to help the patient *resolve his feelings* about the tragedy.

However, a jury might well not have known that the statements were fantasies. Had the lifeguard been on trial for the death of the child--instead of Marylu Redmond on trial for the death of a knife-wielding assailant--plaintiff would no doubt have vigorously opposed any claim of privilege, arguing as petitioner does, that the tortured professions of guilt were "crucial evidence" that the jury was entitled to hear and consider in its search for truth. The case history makes clear, however, that the lifeguard's statements were not "true" in the sense that the plaintiff would want the jury to believe. It would be *the admission* of these psychotherapist-patient statements, not their suppression, that would distort the legal system's search for truth. "Certainly, a court has no interest in allowing an individual's case to be prejudiced by narrations of his fantasies." Comment, *The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved*, 34 Emory L.J. 777, 802 (1985).

In a therapy session, "it does not matter from an epistemological point of view whether a patient's statement is literally true or false." D. Spence, *The Special Nature of Psychoanalytic Facts*, 75 The International Journal of Psycho-Analysis 915, 915-16 (1994). In a courtroom it matters very much. This distinction between the "truth" sought in therapy and the "truth" sought in court, and the fact that much of what is said in therapy is not "true" in the way the law uses that word, demonstrates how uniquely deserving and indeed needy psychotherapist-patient communications are of the protection of privilege--as well as how little if any damage such a privilege would do to the legal system's search for truth.

E. A Privilege For Psychiatrist-Patient Communications Meets The Definitions By Which Privileges Have Historically Been Recognized.

Privileges have historically been recognized as necessary to protect against the destructive impact that disclosure of confidential information would have on certain relationships involving ultimate trust. The concept which undergirds the law of privilege is that some relationships are considered so valuable to society that full candor in these relationships should be fostered by preserving the confidentiality of what is revealed there, even though evidence which might aid in the quest for truth would be lost. *Baylor v. Mading-Dugan*, 57 F.R.D. 509 (N.D. Ill 1972).

There are four fundamental factors which are found in all recognized privileges:

> (1) the communications originated in a *confidence* that they will not be disclosed; (2) this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties; (3) the *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) the *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 J. Wigmore, *Evidence* §2285 (J. McNaughton rev. 1961). Only if these four conditions are present should a privilege be recognized. Id.

All four elements exist in the psychotherapist-patient relationship. First, as discussed above, communications between psychotherapist and patient originate with an understanding that there will be complete confidentiality. Often a patient conceals from associates, relatives and co-workers even the fact that he or she is considering psychotherapy. In that therapy, a patient often discloses feelings about associates, relatives, co-workers and his or her self that the patient may not even anticipate, and certainly does not wish to make known to others. The threat of disclosure would be the ultimate threat to the patient's privacy. That threat may deter many from seeking much-needed therapy.

Second, confidentiality is essential to the development and the realization of the psychotherapist-patient relationship. As explained in Part II.D. above, complete trust and confidentiality in that relation is of utmost importance for a patient to feel safe enough to unburden his or her innermost thoughts to the therapist. The analyst, meanwhile, must be able to clear her mind and be totally receptive to the patient's psychic stresses. But it is impossible to achieve this state of receptiveness if a part of the analyst's mind is concerned with the possibility that the analyst may one day be forced to use the patient's confidences to hurt the patient rather than to heal him.

Third, because the mental health of each individual member of society has long-term effects on society as a whole, there can be no doubt that society has a great interest in the mental health of its members. Mental illness often results in societal burdens such as juvenile delinquency, marital strife, violent crime, and the great cost of caring for the mentally ill. "The societal interest in protecting the confidentiality of therapy is to promote emotional and mental health, which ultimately will reduce antisocial activity and other societal burdens that result from untreated or poorly treated mental problems." S. Smith, *Constitutional Privacy In Psychotherapy*, 49 Geo. Wash. L. Rev. 1, 39 (1980). Society as a whole undoubtedly considers the psychotherapist-patient relationship one that should be sedulously fostered.

Finally, the injury that would result from disclosure is far greater than any benefit gained in litigation. "Disclosure of communications to psychotherapists and their diagnoses would frequently be embarrassing to the point of mortification for the patient." *In re Doe*, 964 F.2d 1325 (2nd Cir. 1992). Not only would such disclosure result in psychological harm to the patient but it would chill future communications with the therapist, resulting in impairment of the therapist's ability to render the help needed, and possibly, premature termination of therapy. On the other hand the benefits gained from disclosure for the correct disposal of litigation are unclear and unreliable. As noted earlier, the confidences disclosed during therapy offer very little reliability as to truth or accuracy.[4]

The arguments favoring a psychotherapist-patient privilege are at least as strong as those found sufficient to support the long-recognized attorney-client privilege. The attorney-client privilege was developed to promote candid consultation with legal advisors by the client and to maximize the lawyer's unhampered access to information which would insure the presentation of the best possible case at trial. *Matter of Walsh*, 623 F.2d 489, (7th Cir. 1980) *cert. denied*, 101 S. Ct. 531 (1980); *United States v. Hodge and Zweig*, 548 F.2d 1347 (9th Cir. 1977); *International Business Machines Corp. v. Edelstein*, 526 F.2d 37 (2d Cir. 1975). In similar fashion, the therapist-patient privilege is essential to protect the patient by encouraging full and confidential disclosure to the therapist of all information, however embarrassing, frightful, or horrific, which might aid the therapist in helping the patient achieve mental balance and peace.

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[4] This is not the case to speak to exceptions to the psychotherapist-patient privilege which the law of most jurisdictions has established, though petitioner's brief devotes much attention to them. Before there can be exceptions, there must first be recognition of the privilege itself. Whether that privilege should be recognized and which therapists should be included in it are the issues on which certiorari was granted. If this Court recognizes the privilege, exceptions to its application can be developed as occasions may arise. It can safely be said, however, that nothing in this virtually classic record of an extended psychotherapeutic treatment approaches any of the circumstances in which exceptions to an extant privilege have been recognized anywhere.

Thus, by all factors historically used to support the finding of privileged communications, the psychotherapist-patient relationship should be recognized as a relationship in which confidentiality must be preserved.

F. The Psychotherapist-Patient Privilege Is Firmly Rooted In The Federal Right To Privacy

1. The privilege is supported by the cases establishing a right to privacy

In *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), this Court restated the parameters of the right to privacy as protected by the federal constitution, as developed to that point in time:

> Although "[t]he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." *Roe v. Wade*, 410 U.S. 113, 152 (1973). This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma ex rel.*

> *Williamson*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453-454; *id.*, at 460, 463-465 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, [262 U.S. 390, 399 (1923)]."

Id. at 684-85 (quoting *Roe v. Wade*, 410 U.S. 113, 152-53 (1973)). The Court has also noted that the privacy right, by definition, involves "the most intimate of human activities and relationships." *Id.* at 685.

Although this Court has never decided whether a right to privacy inheres in the doctor-patient relationship generally, *see Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 2824 (1992) (leaving undecided "[w]hatever constitutional status the doctor-patient relation may have as a general matter"); *cf. Whalen v. Roe*, 429 U.S. 589 (1977), the protection of psychotherapeutic communications which the psychotherapist-patient privilege is designed to serve fits squarely within the principles of the privacy right as pronounced in *Carey*. Unlike most information conveyed to a doctor treating physical ailments, the information communicated to a psychotherapist in the course of therapy concerns virtually without exception "the most intimate of human activities[,] . . . relationships" and thoughts. *Carey*, 431 U.S. at 685. In the words of one court, "[n]o area could be more deserving of protection than communications between a psychiatrist and his patient. Such communications often involve problems in precisely the areas previously recognized by the [Supreme] Court as within the zone of protected privacy, including family, marriage, parenthood, human sexuality, and physical problems." *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F.Supp. 1028, 1038 (D. Haw. 1979).

Recognizing the similarities between psychotherapeutic communications and the intimate spheres of decision accorded constitutional solicitude under the right to privacy, several state and federal courts have decided that the psychotherapist-patient privilege is grounded in the constitutional right to privacy. The first court to do so, of course, was the California Supreme Court in *In re Lifschutz*, 2 Cal.3d 415, 85 Cal. Rptr. 829, 467 P.2d 557 (1970). There the court said:

> We believe that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage. In *Griswold v. Connecticut*, *supra*, 381 U.S. 479, 484 [14 L.Ed.2d 510, 514], the United States Supreme Court declared that "Various guarantees [of the Bill of Rights] create zones of privacy," and we believe that the confidentiality of the psychotherapeutic session falls within one such zone.

Id. at 432. *See also, e.g., In re Zuniga*, 714 F.2d 632, 638 (6th Cir. 1983); *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F.Supp. 1028, 1038 (D. Haw. 1979); *Lora v. Board of Educ. of New York*, 74 F.R.D. 565, 571 (E.D.N.Y. 1977).

2. The scope of the privilege is correctly drawn in Judge Hufstedler's opinion in *Caesar*

The opinion of the *Lifschutz* court was essentially followed by the Ninth Circuit in *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976), which also found that the privilege was grounded in the right to privacy. *Id.* at 1067 n.9. However, *amici* believe that the superior position was not the position of the two majority opinions but that of Judge Hufstedler, writing in concurrence and dissent in *Caesar*. Judge Hufstedler criticized *Lifschutz* for "incorrectly assess[ing] the weight of the patient's right of privacy as against competing public and private rights in the production of evidence in personal injury litigation." *Id.* at 1071. Despite finding that the "confidential communications between a psychotherapeutic patient and his doctor have the indicia to place those communications squarely within the constitutional right of privacy," *id.*, Judge Hufstedler nonetheless found that a limited intrusion on the constitutional right was warranted. Judge Hufstedler proposed a limited exception to the privilege allowing a party to discover the fact of treatment, the cost of treatment and the ultimate diagnosis, but no more, unless the party could establish a compelling need to obtain the substance of the therapeutic communications. *Id.* at 1075. Judge Hufstedler would thus allow the state to intrude upon the zone of privacy created by psychotherapist-patient communications, but only to a limited degree: under Judge Hufstedler's test, psychotherapeutic communications would seldom be subject to disclosure.

Recent United States Supreme Court precedent suggests that Judge Hufstedler's resolution of the issue strikes the appropriate balance. In *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992), the Court held constitutional a state statute requiring doctors to give certain information to women considering abortion, and mandating a 24-hour waiting period between the provision of that information and exercise of the woman's capacity to give informed consent for the procedure. The Court held that the statutory provisions did not constitute an unconstitutional "undue burden" on a woman's right to an abortion before fetal viability, because the provisions did not place a "substantial obstacle" in the path of a woman seeking such an abortion. *Id.* at 2821. In reaching this holding, the Court gave particular emphasis to the fact that the Pennsylvania

statute there in issue required the giving of truthful, nonmisleading information about the abortion procedure and its alternatives, a resolution which did not unduly invade the abortion patient's privacy. *Id.* at 2823.

If this analysis is used to determine the scope of the right to privacy in the psychotherapist-patient context, it is clear that testimony cannot be compelled concerning *the substance* of confidential communications made during such therapy. As set out earlier, expected and actual confidentiality is crucial to successful psychotherapeutic treatment. Were that confidentiality eliminated, it would not only place a "substantial obstacle" in the path of a person seeking psychotherapy, but in many cases it would make it impossible for a person even to consider confiding the secret troubles that psychotherapy can uniquely address. A requirement that a patient (or her therapist) reveal confidences shared in therapy would thus place an "undue burden" on the patient's right to seek and receive psychotherapy treatment, and would thus violate the zone of privacy surrounding the psychotherapist-patient relationship.

Furthermore, the *Casey* court noted the importance that the information which the state required women to have was "truthful, nonmisleading" information, and found a significant state interest in providing such information to women seeking abortions. *Id.* at 2823. Here, of course, the government seeks through legal process to force the patient (or her doctor) to *reveal*, rather than receive, information. But the state's interest in the revelation of that information is not similarly weighty, because the information it seeks is not generally likely to be "truthful, nonmisleading" information. Instead, as explained above, such "information" is heavily weighted toward exaggeration, distortion and fantasy--products of a mind that is almost by definition not coping well with one or more aspects of reality. This information is not "truthful" in the judicial sense, and therefore it is not "nonmisleading." The government thus has little or no legitimate interest in forcing its revelation under circumstances which call out to keep the material private. Balanced against the weighty--indeed, indispensable--privacy concerns surrounding the psychotherapist-patient privilege, the government's demand for the confidential communications must fail.

Judge Hufstedler's resolution of the issue delineates the proper parameters of the relevant privacy concerns. The limited, objective information she proposes to require in her opinion in *Caesar* is "truthful [and] nonmisleading," and probably would not place a "substantial obstacle" in the path of those who need and seek psychotherapeutic treatment. The information--perhaps most notably, the diagnosis--would nevertheless aid the legal system in determining whether there existed a compelling need for further disclosures. In keeping with the gravity of the constitutional privacy right attending the psychotherapeutic relationship, however, seldom would such a showing be possible.

But it must be remembered that the critical issue in this case is not where the limits of the privilege should be drawn. It is whether a psychotherapist-patient privilege should be recognized at all "in the light of reason and experience," as Rule 501 of the Federal Rules of Evidence directs. Due consideration of the competing interests of the search for truth and the protection of those interests of privacy and confidentiality which inhere in psychotherapeutic treatment clearly points toward recognition of that privilege.

III. CONCLUSION

Psychotherapy as we know it today had its origin with Sigmund Freud about 100 years ago. It has become a widely available treatment only in the last fifty years. However, its healing uses have become well established within that short time period, so that "the principles of the common law, . . . interpreted . . . in the light of reason and experience" (Rule 501, Federal Rules of Evidence) strongly

point to the recognition of a psychotherapist-patient privilege by this Court.

The judgment of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

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INTERESTS OF AMICUS CURIAE[1]

The American Counseling Association ("ACA"), with approximately sixty thousand members, is the largest non-profit organization of professional counselors[2] in the United States. Professional counselors serve in private practice, community mental health centers, mental health agencies, schools and universities, hospitals, rehabilitation facilities, business and industry, correctional institutions, and religious organizations. The ACA is dedicated to the growth and enhancement of the counseling profession, and its mission is to promote public confidence and trust in the counseling profession.

Confidentiality between psychotherapist and client is essential to an effective therapeutic relationship. Many of ACA's members provide mental health services, including psychotherapy. The ACA has promulgated a Code of Ethics and Standards of Practice, which imposes a duty of confidentiality on all of its counseling members.[3] The ACA supports recognition of a psychotherapist-client privilege applicable to mental health care providers, including counselors and social workers. Failure to recognize such a privilege could lead to the disruption of psychotherapeutic treatment rendered by ACA members to their clients by forcing the therapist to violate his or her duty to maintain confidentiality, and by violating clients' reasonable expectations that confidentiality will be maintained. The ACA can assist the Court in resolving the questions raised in the writ of certiorari by providing insight into the need for confidentiality in counseling relationships and by demonstrating that the need to promote confidentiality extends to all professional providers of mental health care.

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[1] Counsel for petitioner and counsel for respondents have consented to the filing of this brief. Written consent is on file with the Clerk.

[2] Professional members of the ACA must hold a master's degree or doctorate in counseling or a closely related field. The degree must be from an appropriately accredited college or university.

[3] The ACA's Code of Ethics (section A.3.a.) states that clients have the right to expect confidentiality in the counseling relationship and to be provided with an explanation of its limitations. Section B.1.a. requires counselors to respect their clients' right to privacy and avoid illegal and unwarranted disclosures of confidential information. American Counseling Association, *Code of Ethics and Standards of Practice* (July 1, 1995).

SUMMARY OF ARGUMENT

The Court should affirm the existence of a qualified psychotherapist-client privilege.[4] Congress delegated the power to recognize new privileges to federal courts under Rule 501 of the Federal Rules of Evidence. The justifications for a psychotherapist-client privilege are compelling. Recognition of the privilege protects the confidentiality of the psychotherapist-client relationship. Confidentiality is essential to encourage people who need psychotherapy to obtain treatment, and also to make that treatment effective by encouraging full cooperation with the therapist. In one form or another, the Congress, all fifty

states, and most commentators have acknowledged that the benefits of a psychotherapist-client privilege outweigh any disadvantage due to evidence that the privilege may render unavailable.

A psychotherapist-client privilege protects only confidential communications, similar to the protection provided by the long-standing attorney-client and marital communications privileges. Because psychotherapy is a relatively new profession, the lack of a psychotherapist-client privilege at common law cannot foreclose its recognition in this case. The evidence protected from disclosure by a psychotherapist-client privilege will usually be available from other sources. Such a privilege protects only communications between the psychotherapist and client. In a civil case, this privilege does not permit a client to refuse to divulge any relevant facts on the witness stand, even if those facts occasioned the communications with the psychotherapist. Thus, application of the privilege often will put the adversary in no worse position than if the communications with the psychotherapist had never occurred. Application of the privilege is assessed on a case-by-case basis, allowing courts to reject the privilege when loss of evidence will cause extreme hardship to a party.

The Seventh Circuit's decision to protect the confidential communications between Officer Marylu Redmond and her psychotherapist is appropriately narrow. The court held that the relevant factors weigh in favor of recognizing a qualified psychotherapist-client privilege, and that the administration of justice is not harmed by application of the privilege to this case. Contrary to petitioner's suggestion, the Seventh Circuit did not adopt a sweeping privilege indiscriminately protecting all communications between psychotherapist and client. Recognizing that Rule 501 requires case-by-case analysis, the court made its decision in the context of the specific facts before it.

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[4] As used in this brief, psychotherapy refers to the treatment of mental or emotional disorders by verbal communication between a mental health care provider and a client. Psychotherapy is defined as "[t]he treatment of mental and emotional disorders through the use of psychological techniques designed to encourage communication of conflicts and insight into problems, with the goal being personality growth and behavior modification." *The American Heritage Dictionary of the English Language* 1463 (3d ed. 1992).

The psychotherapist-client privilege is not limited to psychiatrists and psychologists; it extends to other professional providers of psychotherapy. Social workers and professional mental health counselors who practice in this field provide much of the mental health treatment in this country. Many clients seek the services of social workers and mental health counselors because their access to psychiatrists or psychologists is limited. The need for confidentiality characterizes all psychotherapeutic relationships. Forty-one states have recognized that confidential communications with a social worker should be privileged, and thirty-four recognize a privilege for communications with a professional mental health counselor. While the outer boundaries of the psychotherapist-client privilege are not before the Court, the privilege should include all professional sources of psychotherapy, such as the services provided by mental health counselors, and the licensed clinical social worker at issue in this case.

ARGUMENT

A. Congress Gave Courts the Power to Recognize Privileges Beyond Those in Existence at Common Law.

By enacting Federal Rule of Evidence 501, Congress "manifested an affirmative intention not to freeze the law of privilege . . . and to leave the door open to change." *Trammel v. United States*, 445 U.S. 40, 47 (1980). Under Rule 501, the privilege of a witness is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This language is derived from this Court's opinion in *Funk v. United States*, 290 U.S. 371, 383 (1933), which noted that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."

Recognition of valid, justifiable privileges is in keeping with the purpose of Rule 501 and the Federal Rules of Evidence. Petitioner asserts that this Court's "purposeful unwillingness to create evidentiary privileges is consistent with the history of Rule 501 and with the policies of the Federal Rules of Evidence." Pet'r Br. at 14. Petitioner would read Rule 501 out of the rules of evidence. It is one thing to exercise caution before fashioning a privilege that will result in the exclusion of evidence, *see University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189 (1990); it is quite another to construe Rule 501 so narrowly as to render it meaningless. To the contrary, Congress carefully chose the language of Rule 501 "to provide the courts with greater flexibility in developing rules of privilege on a case-by-case basis." *United States v. Gillock*, 445 U.S. 360, 367 (1980).

Article V of the Proposed Federal Rules of Evidence originally contained an exclusive list of nine evidentiary privileges; Congress rejected that rigid approach, and adopted Rule 501 instead. S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7052-53. Rule 501 was adopted in anticipation that "privileges . . . [would] continue to be developed by the courts of the United States." H.R. Rep. No. 93-650, 93d

Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7082. Congress intended, through Rule 501, to authorize the courts to develop additional rules of privilege as the need arose. 120 Cong. Rec. H12253 (daily ed. Dec. 18, 1974) (statement of Rep. Hungate), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7110; *see also Trammel*, 445 U.S. at 47 n.8 (through Rule 501, Congress encouraged the development of privilege law on a case-by-case basis). Petitioner suggests that the history of Rule 501 requires rejection of any privilege not derived from the common law. Pet'r Br. at 19-20 n.28. The opposite is true: Congress made clear through Rule 501 that privileges should not be petrified in their common law state. *See* Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 Neb. L. Rev. 511 (1994) (text, context, and legislative history of Rule 501 demonstrate that a restrictive interpretation of Rule 501 is flawed).

The Second and Sixth Circuits, in addition to the Seventh Circuit in the case under review, have acknowledged the courts' ability to recognize a new psychotherapist-client privilege under Rule 501. *Jaffee v. Redmond*, 51 F.3d 1346, 1354-55 (7th Cir.), *cert. granted*, 116 S. Ct. 334 (1995); *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992); *In re Zuniga*, 714 F.2d 632, 637 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983). These courts accepted a psychotherapist-client privilege only after carefully analyzing the costs and benefits of such a privilege, and expressly noting the qualified nature of the privilege. *Jaffee*, 51 F.3d at 1355-57; *Doe*, 964 F.2d at 1328; *Zuniga*, 714 F.2d at 639. The Fifth, Ninth, and Eleventh Circuits, which refused to recognize a federal psychotherapist-client privilege under Rule 501, did so because of those courts' mistaken belief that Rule 501 limits available privileges to those in existence at common law. *See In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir.), *cert. denied sub nom. Doe v. United States*, 493 U.S. 906 (1989); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989); *United States v. Lindstrom*, 698 F.2d 1154, 1167 n.9 (11th Cir. 1983); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976). Some circuit courts have rejected the psychotherapist-client privilege only in limited circumstances. *See, e.g.*, *United States v. Burtrum*, 17 F.3d 1299, 1302 (10th Cir.) (declining to recognize psychotherapist-client privilege in a criminal child sexual abuse case), *cert. denied*, 115 S. Ct. 176 (1994).

To support the argument against recognition of a new privilege, petitioner cites numerous rules of evidence allowing for the liberal admission of evidence in federal courts. Pet'r Br. at 17-19. Petitioner states that the permissive scheme of the Federal Rules of Evidence is "flatly at odds with respondents' request that the Court create a new rule to exclude relevant evidence." *Id.* at 19. Rule 501 grants federal courts the power to identify privileges, however, indicating that in the scheme of the federal rules, the need for a specific privilege can outweigh any general presumption for admission of all relevant evidence. Rule 501 represents Congress' recognition of the tension between the competing policies of protecting confidential relationships and promoting access to evidence, and its recognition of the courts' power to reconcile these policies.[5]

No psychotherapist-client privilege existed at common law. *See In re Grand Jury Proceedings*, 867 F.2d at 565. Recognition of psychotherapy as a mode of treatment, however, did not develop until the modern era.[6] The substantial arguments in favor of a privilege protecting the psychotherapeutic relationship should not be rejected merely because the treatment is a modern one. *Funk*, 290 U.S. at 382-83 ("flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law"). The arguments that support a psychotherapist-client privilege are strikingly similar to those that support well-established common law privileges, such as the attorney-client privilege and the marital communications privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (attorney-client privilege is intended to promote full and frank communication between attorney and client); *Trammel*, 445 U.S. at 51 (attorney-client and marital communications privileges are designed to protect confidential communications).

B. The Court Should Recognize a Qualified Psychotherapist-Client Privilege.

To determine whether to recognize an evidentiary privilege, a court must first inquire whether the privilege promotes sufficiently important interests to outweigh the need for evidence at trial. *Trammel*, 445 U.S. at 51. The scope of a qualified privilege, once identified, is determined on a case-by-case basis. *Upjohn*, 449 U.S. at 396. Here, the Seventh Circuit carefully weighed the costs and benefits, generally and in this particular case, before recognizing a qualified psychotherapist-client privilege. *Jaffee*, 51 F.3d at 1355-57. After analyzing the appropriate factors, the court determined that such a privilege existed, and protected the confidential communications at issue. *Id.* at 1357-58. The court expressly declined to address application of the privilege in factual scenarios not before it. *Id.* at 1357. The Seventh Circuit did not create a blanket privilege, as petitioner contends. Pet'r Br. at 11. The court's opinion correctly concludes that the balance tips in favor of recognizing a qualified psychotherapist-client privilege, that application of the privilege must be on a case-by-case basis, and finally, on the facts of this case, that the benefits of protecting confidentiality outweigh the need for evidence. *Jaffee*, 51 F.3d at 1356-58.

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[5] Similarly, petitioner's argument that the district court's ability to control discovery through protective orders is an adequate substitute for a privilege must fail. Pet'r Br. at 41. A privilege is designed to prevent use of the protected information in the litigation in a manner adverse to the interest of the holder of the privilege. Protective orders limit access to confidential information; they do not prohibit adverse use of the information in litigation. *See, e.g.*, Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. Rev. 893, 923-24 (1982) (study indicating that before enactment of psychotherapist-patient privilege statute in Texas, Texas judges admitted into evidence relevant confidential communications between patient and therapist). In the attorney-client context, for example, a protective order might prevent the public's access to attorney-client communications, but the attorney-client relationship would still be damaged by the use of those communications against the client in litigation.

[6] *See* Franklin D. Cleckley, *A Modest Proposal: A Psychotherapist-Patient Privilege for West Virginia*, 93 W. Va. L. Rev. 1, 37 (1990) (first psychotherapist-client privilege in the United States was passed in Kentucky in 1948); Lauren Messersmith, Comment, *Evidence: The Psychotherapist-Patient Privilege under Federal Rule of Evidence 501*, 23 Washburn L.J. 706, 711 (1984) (noting increasing popularity, respect, and status for the psychiatric profession); *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1530 (1985) (citing Louisell, *The Psychologist in Today's Legal World* (pt. 2), 41 Minn. L. Rev. 731, 731-35 (1957)).

1. The substantial benefits of a psychotherapist-client privilege are widely accepted and support recognition of the privilege.

Congress has expressed approval for a psychotherapist-client privilege, S. Rep. No. 93-1277, *reprinted in* 1974 U.S.C.C.A.N. at 7059, and the legislature of every state has enacted some form of privilege to protect confidential communications with a psychotherapist. *Jaffee*, 51 F.3d at 1356. In addition, several Courts of Appeal have recognized a qualified privilege after balancing the competing interests. *Id.* at 1357; *Doe*, 964 F.2d at 1328-29; *Zuniga*, 714 F.2d at 638-39. Commentators almost uniformly favor some form of the privilege.[7] Reason and experience thus warrant explicit recognition of a psychotherapist-client privilege by this Court.

The proposed Federal Rules of Evidence, submitted to Congress for approval in 1973, included an exclusive list of nine privileges set out in Article V. *Proposed Fed. R. Evid.*, 56 F.R.D. 183, 230-61 (1973). Proposed Rule 504 defined a psychotherapist-client privilege. *Id.* at 240-41.

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[7] *See, e.g.*, Cleckley, 93 W. Va. L. Rev. at 51; Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597, 620-21 (1980); Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other*, 75 Ky. L.J. 473, 556-57 (1986).

Congress did not pass Rule 504, or any other specific privilege rule in Article V. S. Rep. No. 93-1277, *reprinted in* 1974 U.S.C.C.A.N. at 7053. When adopting Rule 501 in place of a roster of specific privileges, Congress noted that it was rejecting Article V's restrictive approach of a list, not the content of the particular privileges themselves that the list contained:

> [I]n approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient . . . [privilege] contained in the [proposed] rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Id. at 7059. Accordingly, the legislative history of the Federal Rules of Evidence supports the existence of a psychotherapist-client privilege.

State privilege law is relevant when considering the existence of a federal privilege. *Gillock*, 445 U.S. at 368 n.8; *see also Trammel*, 445 U.S. at 49-50 (taking note of state law trend to limit privilege against adverse spousal testimony because regulation of marriage is an area of state concern). All fifty states have enacted statutes providing some form of privilege protecting psychotherapist-client relationships. *See Jaffee*, 51 F.3d at 1356. Petitioners make much of the fact that these state laws are not uniform and contain various exceptions to the privilege. Pet'r Br. at 31-38. By stressing variation among the individual trees, petitioner ignores the nationwide forest of state privilege statutes: *all* state legislatures have enacted some form of the privilege because they determined that the benefits associated with the psychotherapist-client privilege generally outweigh the costs of excluding otherwise admissible evidence.

In *Trammel v. United States*, the Court noted that common law testimonial privileges "are rooted in the imperative need for confidence and trust." 445 U.S. at 51. A privilege may protect confidences in order to preserve a vital professional relationship, like the attorney-client privilege, or may simply be recognized by the courts out of respect of certain spheres of privacy, as in the marital communications privilege. *Id.* *Both* of these justifications for testimonial privileges apply to the psychotherapist-client relationship. The Court curtailed the privilege against adverse spousal testimony in *Trammel* because the privilege was not limited to confidential communications and its justification was archaic. *Id.* at 51-52. The opposite is true of the psychotherapist-client privilege, which protects private communications between a professional and a client in a therapeutic relationship whose importance continues to grow over time.

The attorney-client privilege promotes frank disclosure by clients to their attorney, because an attorney must be fully informed to provide competent legal advice. *Upjohn*, 449 U.S. at 389. Similarly, the psychotherapist-client privilege rests on the principle that clients should be able freely to reveal private information to mental health professionals without fear of later disclosure in court. Successful psychotherapy hinges on clients' trust and confidence in their psychotherapist. Bruce R. Hopkins & Barbara S. Anderson, *The Counselor and the Law* 9 (3d ed. 1990).

The marital communications privilege protects marital confidences that are "so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." *Wolfle v. United States*, 291 U.S. 7, 14 (1934). The private and confidential nature of communications between psychotherapist and client parallels the intimate communications between spouses. Just as this Court is willing to protect the privacy of the marital relationship, the Court should recognize a psychotherapist-client privilege to protect the confidential communications that occur in such relationships. There is nothing more private than a person's dreams, fantasies, thoughts and fears. *See* Smith, 75 Ky. L. J. at 478.

Moreover, a psychotherapist-client privilege is essential to the effective functioning of psychotherapeutic treatment. First, common sense supports the proposition that in the absence of a privilege to support clients' perception of confidentiality,[8] a significant number of clients would be reluctant to seek treatment. *See, e.g.*, Appelbaum et al., 12 Bull. Am. Acad. Psych. Law at 115. Much of society still stigmatizes those who have mental or emotional problems. *See* Kathleen L. Cerveny & Marian J. Kent, *Recent Decision: Evidence Law - The Psychotherapist-Patient Privilege in Federal Courts*, 59 Notre Dame L. Rev. 791, 798 (1984) (clients have a legitimate interest in protecting information because of the social stigma attached to treatment); Kathryn M. Denkowski & George C. Denkowski, *Client-Counselor Confidentiality: An Update of Rationale, Legal Status, and Implications*, Personnel & Guidance J. 371, 372 (Feb. 1982) (confidentiality protects clients from the social stigma associated with therapy). Because healthy individuals are more productive and stable, a psychotherapist-client privilege that encourages troubled persons to seek therapy promotes the public good.[9]

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[8] Some empirical studies suggest that clients rely on a professional's ethical duty to maintain confidentiality rather than on a privilege. *See, e.g.*, Shuman & Weiner, 60 N.C.L. Rev. at 920 (patient survey indicating that ninety-six percent of patients rely more heavily on confidentiality duty than privilege). However, it is not clear that patients understand the difference between the two. *See* Daniel W. Shuman et al., *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 Int'l J. Law & Psych. 393, 416 (1986) (patients involved in study may have been confused about distinction between therapists' ethical and legal obligations); Paul S. Appelbaum et al., *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psych. Law 109, 115 (1984) (patients are "overwhelmingly confident" that their therapists will protect their privacy, so studies demonstrating that patients do not consider privileges

Second, the benefit obtained by encouraging clients to consult with professionals and fully disclose their problems does not evaporate even if some clients might continue to seek therapy without a privilege. Once a person seeks psychotherapy, confidentiality is essential for effective

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before confiding in their therapists do not imply that patients would engage in therapy if it were clear confidentiality could not be guaranteed). The Canadian study indicated that revelations having legal implications were most likely to be affected by the absence of a privilege. Shuman et al., 9 Int'l J. Law & Psych. at 414. Thus, the privilege may most effectively encourage disclosure by those most likely to need the protection of the privilege.

[9] An estimated twenty percent of all adults suffer at least one mental disorder. Ron Lechnyr, *The Cost Savings of Mental Health Services*, EAP Digest 22, 22 (Nov./Dec. 1993).

treatment. *See* Leon VandeCreek et al., *Client Anticipations and Preferences for Confidentiality of Records*, 34 J. Couns. Psych. 62, 62 (1987) ("[c]lients have reported that fears of loss of confidentiality could be devastating to their treatment"). Therapy involves disclosure of sensitive matters a person normally is reluctant to discuss, and clients will resist revelation of personal problems unless they trust their psychotherapist. Hopkins & Anderson, *The Counselor and The Law* at 9. A psychotherapist-client privilege fosters such trust and thereby furthers treatment. *See* David Nowell & Jean Spruill, *If It's Not Absolutely Confidential, Will Information Be Disclosed?*, 24 Prof. Psych.: Research & Prac. 367, 369 (1993) (reporting results of a study that suggested that client informed of the limits of confidentiality may be less willing to reveal extreme thoughts). A substantial benefit thus is gained if the privilege furthers disclosure in psychotherapy, even if clients would seek therapy with or without the privilege. As this Court noted in the context of the attorney-client privilege, even if a client has a strong incentive to confide, "the common law has recognized the value of [a] privilege in *further* facilitating communications." *Upjohn*, 449 U.S. at 393 n.2 (emphasis added); *see* Shuman & Weiner, 60 N.C.L. Rev. at 926 (noting that the results of a survey of therapy clients revealed that for some clients the quality of treatment would be furthered by a privilege statute). Without that revelation, it is the client, not the trained therapist, who is choosing what information is important. Saltzburg, 66 Va. L. Rev. at 620-21.

Therapy often focuses on a clients' thoughts, not actions. Clients must be free to explore thoughts and feelings without the fear that by admitting them the disclosures will later be used against them.

> Clients who seek the assistance of a mental health professional . . . reveal private information about their thoughts, feelings, fantasies, and conduct. This disclosure of sensitive, sometimes embarrassing or shameful, personal information makes clients vulnerable to being harmed if unauthorized third parties gain access to such information. Clients assume or seek assurances that sensitive information will be a confidential communication to their [mental health provider], and unless they can trust their therapist and rely on confidentiality, they are unlikely to cooperate fully in their therapy.

Michele Smith-Bell & William J. Winslade *Privacy, Confidentiality, and Privilege in Psychotherapeutic Relationships*, 64 Am. J. Orthopsych. 180, 180 (Apr. 1994). Clients who are confident that their disclosures will not be revealed to others will better be able to reveal such thoughts and be treated effectively. *See* Nowell & Spruill, 24 Prof. Psych: Research & Prac. at 369 (study demonstrated that potential therapy clients informed of limits of confidentiality are more reluctant to self-disclose).

A privilege may also strengthen the psychotherapist-client relationship by preventing harm to a client involved in litigation. Revelations of confidential communications in court may cause psychological harm to the client. *See* Shuman et al., 9 Int'l J. Law & Psych. at 417 (concluding that "several types of damage did occur to some of the patients whose therapists testified about them"). In addition, compelling a mental health care provider to testify in court would likely devastate an ongoing psychotherapist-client relationship. *See* Appelbaum et al., 12 Bull. Am. Acad. Psych. Law at 114 (survey indicating that seventy-two percent of clients believe that unauthorized disclosure of communications might adversely affect an ongoing relationship); VandeCreek et al., 34 J. Couns. Psych. at 66 (survey indicated that clients were likely to withhold revelations, end treatment, or sue if psychotherapist breached confidentiality).

These considerations all apply to Officer Redmond's therapeutic relationship on the facts of this case. In the course of her duties, Officer Redmond was involved in a violent and traumatic episode, with inevitable consequences for her mental and emotional state.[10] Recognition of a psychotherapist-client privilege will encourage those in Officer Redmond's position to obtain the help they need through psychotherapy. Police officers are often subject to civil suits. *See, e.g.*, Lant B. Davis et al., Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781 (1979). The absence of a psychotherapist-client privilege protecting police officers' revelations to their psychotherapists would inevitably discourage them from seeking psychotherapy for matters troubling them. If the officers did seek counseling, fear that their candor may come back to haunt them in a civil suit may prevent them from being open and forthright. *See* Anderson & Bauer, 65 J. Couns. & Dev. at 383.

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[10] One description of a police officer's reaction to use of deadly force reads:

> The immediate response may include disbelief, shock, denial of feelings, and confusion. . . . As the first week passes, considerable self-questioning takes place. . . . Depression may develop and may be accompanied by angry or guilty feelings. The officer may spend a great deal of time replaying the incident and looking for alternative actions. . . . [T]he posttraumatic stress syndrome can continue for years, resulting in alcoholism, family disruption, impotence, depression, and general inability to deal with stress.

Wayne Anderson & Barbara Bauer, *Law Enforcement Officers: The Consequences of Exposure to Violence*, 65 J. Couns. & Dev. 381, 383 (Mar. 1987).

2. The costs associated with a psychotherapist-client privilege are often minimal, and courts can adequately consider them on a case-by-case basis.

As this Court noted in the context of the attorney-client privilege, "[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn*, 449 U.S. at 395. In most civil cases, a client can be compelled to take the stand and testify as to any relevant facts, regardless of whether those facts were also discussed during a psychotherapeutic relationship. In addition, evidence lost because of a privilege will often be available from sources other than the client. *See, e.g.*, Shuman et al., 9 Int'l J. Law & Psych. at 417 (fifty percent of judges questioned in three surveys thought that information covered by a psychotherapist-client privilege was available from nonconfidential sources). In cases in which the evidence sought to be protected by a privilege is both crucial and unavailable elsewhere, the qualified privilege may be outweighed by the interests of justice. *See, e.g.*, *Burtrum*, 17 F.3d at 1302 (declining to recognize a psychotherapist-client privilege in a criminal child sexual abuse case).

Some evidence is available only because of the existence of the privilege. A client's belief that disclosures in psychotherapy will be kept confidential no doubt encourages some clients to reveal their thoughts and confidences. If those revelations occur only because of the confidential nature of the relationship and the privilege serves to protect that confidentiality, then loss of that evidence cannot be said to be a cost of the privilege. *Developments in the Law*, 98 Harv. L. Rev. at 1477; *see also Upjohn*, 449 U.S. at 395 (recognizing that application of the attorney-client privilege ordinarily puts an adversary in "no worse position than if the communications had never taken place"). Also, as petitioner notes, only a small number of clients become litigants in federal court. Pet'r Br. at 30. While the privilege will benefit many clients by fostering the clients' trust in their counselors' duty of confidentiality, Nowell & Spruill, 24 Prof. Psych: Research & Prac. at 369, the actual cost in terms of lost evidence will be slight.

In addition, any evidence available from a therapy session often will be misleading or irrelevant in court. That evidence may consist of thoughts, desires, and even fantasies whose relationship to the factual record is tenuous, at best. As Professor Slovenko wrote:

> The crusade and the hullabaloo over privilege in civil or criminal cases . . . insinuates that the content of a psychotherapy session may be relevant or material in litigation. Out of a sense of pride a person may fear disclosure of the confidences he makes about his sexual

> life, his dependency, his insecurity, his struggle in interpersonal relations, all interspersed with fantasy. But these subjects have little or no significance in legal proceedings. The dialectic of one's right of privacy versus the danger that secrecy will allow truth to go undetected is not here the contest. . . . The sunlight advocated by Justice Brandeis would not come from disclosure of psychotherapy sessions, even if they were tape recorded.

Ralph Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 Cath. U. L. Rev. 649, 661-62 (1974).

In this case, the evidence from Officer Redmond's psychotherapy treatment that would be shielded from disclosure by a psychotherapist-client privilege is cumulative evidence that petitioner seeks to use for impeachment purposes only. Pet'r Br. at 21-25. The need for impeachment evidence does not outweigh the interests served by application of the psychotherapist-client privilege. If the impeachment evidence sought by petitioner in this case were sufficient to overcome the need for protection of confidences, then the exceptions would swallow not only this privilege, but *any* qualified privilege. Given the broad scope of potential impeachment evidence, any revelation to a psychotherapist would be fair game, and the privilege would exist in name only.

Petitioner seeks evidence regarding confidential disclosures made during psychotherapy sessions, hoping to establish that Officer Redmond's version of events on the day Ricky Allen was killed is inaccurate. Officer Redmond testified at trial as to the events during the shooting. Pet'r Br. at 10. Traditional methods of cross-examination and impeachment, without the evidence from the psychotherapy sessions, are more than adequate tools to challenge her version of events. *See Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (traditional means of challenging the accuracy of testimony are available to impeach previously hypnotized witnesses). Moreover, many people witnessed the shooting, some of whom took the stand and offered versions of the event quite different from Officer Redmond's description. Pet'r Br. at 3-5. Petitioner was not limited to impeachment through testimony of the deceased's relatives, but was able to call other police officers to the stand to dispute Officer Redmond's version of events. *Id.* at 5.

Petitioner argues that the need for evidence in a civil rights action under 42 U.S.C. § 1983 necessarily outweighs a defendant's interest in therapy. Pet'r Br. at 38-39. Nowhere in the Federal Rules of Evidence, however, is there a suggestion that impeachment evidence is more important or more relevant in a federal civil rights action than in other causes of action, or that the recognition of privileges depends on the particular cause of action asserted. *Cf. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) (rejecting heightened pleading standard for sec. 1983 causes of action as contrary to the notice pleading requirement of Federal Rule of Civil Procedure 8(a)(2)). That section 1983 is a "uniquely federal remedy" is likewise irrelevant. Pet'r Br. at 38. Rule 501 provides for application of state privilege law when state law supplies the rule of decision. Therefore, application of federal privilege law will always arise in the context of a federal cause of action.

Petitioner attempts to analogize the situation in this case to cases rejecting testimony generated by hypnotism or memory refreshment, arguing that hiding the many psychotherapy sessions from the jury undermines the integrity of the factfinding process. Pet'r Br. at 22-23. Officer Redmond, however, engaged in therapy to help her recover from a traumatic event, not in an attempt better to recollect the shooting or to testify more persuasively about it. Cases dealing with actions undertaken deliberately to refresh a witnesses' testimony are simply not parallel to the facts of this case. Officer Redmond did not attend over fifty psychotherapy sessions because it would be "[a]n effective tactic in cross-examination." Pet'r Br. at 22; *see also Rock*, 483 U.S. at 56 (noting, when striking down application of an Arkansas rule against posthypnosis testimony, that the rule applied to any witness regardless of the reasons for the hypnosis).

C. The Justifications for a Psychotherapist-Client Privilege are not Limited to Psychiatrists and Psychologists.

The Seventh Circuit correctly held that the psychotherapist-client privilege is not limited to psychiatrists or psychologists, and that confidential communications with a licensed clinical social worker fall within the psychotherapist-client privilege. *Jaffee*, 51 F.3d at 1358 n.19. The arguments in support of a psychotherapist-client privilege apply to any professional relationship in which psychotherapy is provided, including Officer Redmond's treatment by the licensed social worker in this case. Petitioner relies on proposed Rule 504 to demonstrate a supposed Congressional intent to confine the protection of

the privilege to psychiatrists and psychologists. Pet'r Br. at 39-40. Congress, however, rejected Rule 504, and the legislative history of Rule 501, adopted in its stead, contradicts petitioner's argument.

Proposed Rule 504 would have limited the psychotherapist-client privilege to psychiatrists and psychologists. *Proposed Fed. R. Evid.*, 56 F.R.D. at 240-41. Some lower courts that have refused to recognize a psychotherapy privilege have done so based on proposed Rule 504's limitation. *See, e.g.*, *Cunningham v. Southlake Center for Mental Health, Inc.*, 125 F.R.D. 474, 477 (N.D. Ind. 1989) (holding that the federal psychotherapist-client privilege should extend beyond the parameters of proposed Rule 504); *see also Dixon v. City of Lawton, Oklahoma*, 898 F.2d 1443, 1450 (10th Cir. 1990) (relying on proposed Rule 504 to find an exception to the psychotherapist-client privilege when client put his mental condition at issue in litigation). These courts, and petitioner's brief, ignore Congress's rejection of proposed Rule 504. *See Bob Jones University v. United States*, 461 U.S. 574, 600 (1983) (Congress' failure to pass legislation is ordinarily a poor indicator of legislative intent). In fact, the legislative history of proposed Rule 504 demonstrates that there was Congressional support for extension of the privilege beyond psychiatrists and psychologists. *Rules of Evidence: Hearings Before the Subcomm. on Reform of Federal Criminal Laws of the Comm. of the Judiciary*, 93d Cong., 1st Sess. 460-65 (1973) (questioning witnesses regarding social worker privilege).

No material difference exists between the psychotherapy provided by psychiatrists and psychologists, and that provided by social workers and mental health counselors, that would justify excluding the latter and their clients from the protection of the privilege. *See Developments in the Law*, 98 Harv. L. Rev. at 1550 ("the services offered by other counselors constitute a subset of those offered by psychotherapists and are therefore indistinguishable from the services of psychotherapists"). Indeed, definitions of psychotherapy do not depend on the identity or credentials of the therapist; rather, psychotherapy is defined by the nature of the treatment rendered, and so should be the privilege.[11] Moreover, most states do not limit their psychotherapist-client privilege to psychiatrists and psychologists; the privileges extend to professional mental health counselors and social workers who also provide psychotherapy.[12]

---

[11] Psychotherapy is defined as:

> treatment designed to produce a response by mental rather than by physical effects, including the use of suggestion, persuasion, re-education, reassurance, and support . . . .

Dorland's Illustrated Medical Dictionary 1284 (25th ed. 1974); *see also* note 3, *supra*, (citing *American Heritage Dictionary* definition of psychotherapy).

[12] Thirty-four states have established some form of privilege protecting communications between counselors and clients. Ala. Code § 34-8A-1; Ariz. Rev. Stat. Ann. § 32-3283; Ark. Code Ann. § 17-24-308; Colo. Rev. Stat. § 12-43-201; Del. Code Ann. tit. 24, § 3013; Fla. Stat. ch. 491.0147; Idaho Code § 54-3410; Ill. Rev. Stat. ch. 225, para. 107/75; Kan. Stat. Ann. § 65-5810; La. Code Evid. Ann. art. 510; Me. Rev. Stat. Ann. tit. 32, § 13862; Mass. Ann. Laws ch. 112, § 172; Mich. Stat. Ann. § 14.15(18117); Mo. Rev. Stat. § 337.540; Mont. Code Ann. § 37-23-301; Neb. Rev. Stat. § 27-504; N.H. Rev. Stat. Ann. § 330-A:19; N.J. Stat. § 45:8B-49; N.M. Stat. Ann. § 61-9A-27; N.C. Gen. Stat. § 8-53.8; N.D. Cent. Code § 43-47-09;

The need to protect the confidential communications between a psychotherapist and a client does not disappear simply because the provider's credentials differ. The problem for which the client seeks treatment and the function performed by the therapist are the same. What is essential for application of the privilege should be that the client seeks to protect confidential communications disclosed to a psychotherapist. Slovenko, 23 Cath. U. L. Rev. at 664. Application of the psychotherapist-client privilege based on the function performed by a mental health care provider conforms more closely to the purpose of the privilege than any arbitrary line drawing based on which diploma or license hangs on the provider's office wall.

Moreover, confining the psychotherapist-client privilege to psychiatrists and psychologists would limit the number of professionals providing the most confidential therapy. Social workers and mental health counselors who provide the same therapy would be less able to assure clients of confidentiality. Limiting the privilege exclusively to psychiatrists and psychologists would thus unfairly preserve the privilege only for those able to obtain access to psychiatrists or psychologists.

The therapist in this case was a clinical social worker with a master's degree and extensive training in her field.

Ohio Rev. Code Ann. § 2317.02; Okla. Stat. tit. 59, § 1910; Or. Rev. Stat. § 40.262; R.I. Gen. Laws §§ 5-63-17, 9-17-24; S.D. Codified Laws Ann. § 36-32-27; Tenn. Code Ann § 63-22-114; Tex. R. Civ. Ev. Rule 510; Utah Code Ann. § 58-60-114; Va. Code Ann. § 8.01-400.2; Wash. Rev. Code Ann. § 18.19.180; W. Va. Code § 30-31-13; Wis. Stat. § 905.04; Wyo. Stat. § 33-38-109. Forty-one states have created a social worker-client privilege. Pet'r Br. at 35.

Jaffee, 51 F.3d at 1350 n.3. The state of Illinois certified the therapist as an employee assistance counselor, 51 F.3d at 1350, and under Illinois law confidential communications between the therapist and her client were privileged. Ill. Rev. Stat. ch. 225, para. 20/16. In fact, as petitioner notes, only nine states fail to provide any protection whatsoever for communications to social workers. Pet'r Br. at 35. There simply are no persuasive arguments for denying the psychotherapist-client privilege to the relationship in this case.

CONCLUSION

For the reasons stated above, the American Counseling Association respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Seventh Circuit.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CARRIE JAFFE, as Special Administrator
for RICKY ALLEN, SR.,

Petitioner,

v.

MARY LU REDMOND and VILLAGE OF
HOFFMAN ESTATES, ILLINOIS,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Respondents Mary Lu Redmond and the Village of Hoffman Estates, Illinois's arguments for affirmance of the judgement in this case of the United States Court of Appeals for the Seventh Circuit which reversed the original trial verdicts against Respondents and remanded their cause for a new trial.

NAPO is a nationwide association of labor and trade organizations representing state, local and federal law enforcement officers. Among other entities, NAPO represents the Illinois Police Association and the Policemen's Benevolent and Protective Association of Illinois. NAPO represents law enforcement officers throughout the state of Illinois, the territory of the Seventh Circuit, and the United States. Through its state and local affiliates, NAPO actively represents approximately 185,000 sworn law enforcement officers throughout the country. In 1994, NAPO founded the National Law Enforcement Officers' Rights Center, which advocates the necessity of assuring fundamental due process rights for law enforcement officers in the face of increasing political pressures for the investigation and prosecution, both civil and criminal, of police.

NAPO has an important interest in this matter, as the case presents issues the resolution of which will define the extent to which law enforcement officers throughout the United

States may seek out and rely upon the assistance of mental health professionals to cope with and function under the extraordinary stresses of modern police work. With the possible exception of having one's partner murdered, being forced to take the life of another, albeit justified, constitutes the very nadir of psychic trauma in police work. A clear enunciation of the scope and type of counseling which may be provided as a practical matter to officers in this situation is of tremendous importance to the constituent members of NAPO.

NAPO has received the written consent of Petitioner Jaffee and of Respondents Mary Lu Redmond and the Village of Hoffman Estates, Illinois to the filing of this brief as required by Rule 37.3 (a) of the Rules of this Court. The original copies of all consents have been filed with the Clerk of the Court as required by that Rule.

SUMMARY OF ARGUMENT

The men and women who serve our society as law enforcement officers are today exposed to extremes of violence, human misery, depravity, poverty and suffering of innocents unimaginable to most persons and which were for the most part foreign to police work as it was even 30 years ago. With the possible exception of combat veterans, today's police officer sees, and feels, and hears and smells more carnage and trauma than any other professional. As with combat veterans, it is becoming increasingly clear that the psychic injuries sustained in the course of such an occupation can and often are more debilitating than merely physical ones. This is particularly true when, as in the case at bar, an officer who swore to protect life and property is forced by circumstance and the actions of another to take the life of another human being.

In the aftermath of such a profoundly traumatic experience, it is to be expected that the officer involved will be in dire need of assistance. If the officer is to continue to function as a person, let alone return to her duties, then counseling with a professional mental health caregiver becomes crucial. Appropriate, timely psychic care can not only ease the mental anguish of the officer involved; it can also salvage and secure to the public the services of an experienced and highly-trained law enforcement officer. The days of a culture of *machismo* relegating officers to the solitary and illusory comfort of a bottle in an effort to cope with their psychic pain are thankfully gone. Officers, police associations and employers alike are becoming increasingly aware of the value of police seeking mental health counseling when they need it. Effective counseling of traumatized law enforcement officers is of undeniable benefit to the officers themselves, their departments, their families and of course to the public they serve.

To be effective, however, such counseling must be perceived to be, and be in fact confidential. "Confidentiality" in this context includes the ability of an officer (and the obligation of a mental health professional) to assert a claim of privilege regarding the contents of counseling sessions and therapeutic discussions. Such a claim deserves to be looked on favorably by the Courts of the United States "in the light of reason and experience." Fed. R. Evid. 501.

ARGUMENT

I. THE PRACTICAL AVAILABILITY OF PROFESSIONAL MENTAL HEALTH COUNSELING HAS BECOME ESSENTIAL IN MODERN POLICE WORK.

"An American law enforcement officer encounters more human tragedy in the first three years of his career than most of us see in a lifetime." E. Scrivner, *Psychological Reactions to the Use of Deadly Force,* Nat'l Sheriff Mag., Feb./Mar. 1985.

Police work embraces that which is most noble about the human condition. It extols service to others; it values protection for the weak; it commits itself to justice and it rewards bravery and sacrifice. At the same time, however, that we demand that our police officers follow these lofty ideals, they often serve in the very abyss of human cruelty and depravity. No one knows better than a police officer the evil that men can do. The extent of man's capacity to do wrong is such that even a veteran of police work can be shocked by what he or she sometimes sees. And hears. And touches. Yet however strong the feeling of repulsion, however great the urge to flee or to ignore, the officer has sworn an oath to do his or her duty.

It is the officer who must try to revive the obviously dead infant. It is the officer who must deliver the terrible news that a spouse has been killed. It is the officer who crawls into the canal to pull out the grotesquely disfigured body. It is the officer who holds and tries in vain to comfort the violated child. It is the officer who is so often despised by others simply because of the job he or she does. It is the officer who sacrifices so much of family life and relationships for "the Job". It is the officer who is so frequently the target of violence even unto death. And it is sometimes the officer who, as here, is forced by circumstance and the violent acts of another to take a human life in order to save another, innocent one.

The taking of a life runs so fundamentally counter to everything most people believe that it will be avoided even by combat soldiers if at all possible. D. Grossman, *On Killing* (1995). For a police officer who is forced, against her nature, to kill another, the event is searingly traumatic:

> Police officers drill for that split second when they shoot to kill to protect their own life or the lives around them. True, police officers live through that split second, but they carry their wounds on the inside. The officers who have been there say that the dead never let them go. The officer "swears he saw the bullet leave the gun, even though he knows nobody really can . . . 'I saw his shirttail fly up when the bullet went through him. He was going down and I swear he was getting bigger. It's amazing: After all these years it's difficult to talk about. You know that you've killed someone. You think, My God! You want him to stop. To drop the knife. I could actually see the trajectory of the bullet. I've shot millions of rounds and never seen one before. It's a physical and psychological phenomenon that cops go through when they shoot." . . .[¶] An officer responding as backup to a disturbance call in an apartment building fatally shot a suspect who lunged at a fellow officer with a knife. The shooting officer, now a sergeant, reported that she often relives the incident: "You get into that morality play with yourself -- It's not my job to take somebody's life -- but then you tell yourself 'But I had to do it.' "

L. Petrillo, *Officers Carry Their Wounds on the Inside*, San Diego Union, Dec. 21, 1990, at A-10.

In their comprehensive survey of the extant literature on

police use of deadly force, *Deadly Force: What We Know*, (1992), William A. Geller and Michael S. Scott report:

> Police psychologists and psychiatrists have identified a variety of post-shooting traumatic responses that police officers around the nation have experienced. For example, Russell and Beigel (1990: 368-373) have identified the following stressful reactions among officers who have shot someone:
>
> 1. *Sensory distortion.* Time slows down; everything happens in slow motion.
> 2. *Flashbacks.* Many things subsequently occur that instantly remind you [sic] of the shooting -- another shooting, the sight of a body in the street. You live it over and over.
> 3. *Fear of insanity.* Officers may have this fear because of symptoms in (1) and (2) above.
> 4. *Sorrow over depriving a person of life.* It is very difficult to break the cultural and religious prohibition against killing. Even police officers who have previously killed in military combat state that a police shooting is entirely different. [As one officer put it], 'In a war, that's what you're there for . . . to wipe them out. Police work isn't like that. You are certainly not on a search and destroy mission' (Cohen 1980).
> 5. *Crying.* This usually happens outside the police environment because the macho image does not permit tears.
> 6. *Grasping for life.* Officers become very concerned about their families, their home life,

concerned about their families, their home life, being loved and accepted by others -- a sort of guilt reaction to the shooting.

7. *Nightmares.* One officer reported frequent nightmares in which the suspect kept coming at him, looming ever larger and ever nearer while the officer frantically pumps bullets into the apparition.

8. *A heightened sense of danger.* A shooting brings many officers face to face with their own mortality. No longer can they maintain the idea that 'It won't happen to me.' For some officers this has resulted in their leaving law enforcement [see, e.g., *New York Times*, Aug. 19, 1992, at A13; Ford and Malnic (1992)]. Although exact statistics are not available, it has been reported that between 50 and 80 percent of officers involved in shootings have left police work (Baruth 1986: 307).

9. *Anger and hate toward the victim/suspect.* Solomon and Horn (1986) state that this is the second most frequent and severe post-shooting reaction. Officers curse the victim/suspect for 'making them do it,' but this anger may mask the feelings of fear and vulnerability that the incident aroused in officers so that the curse more properly may be expressed as 'goddamn you for making me feel so vulnerable.'

10. *Isolation/withdrawal.* Officers may think that no one will understand what they are going through. They don't want to risk being ridiculed or put down. Peer support from shooting experience can be most helpful at this time.

11. *Fear and anxiety about the next time it happens.* One officer who shot a suspect who[m] he thought was armed (he wasn't) expressed fears that the 'next time maybe I'll hesitate to shoot and this time the a______ will have a gun and he'll blow my [expletive deleted] head off.'

12. *Fear that they will be fired, criminally charged, or sued in civil court.* These are frequent reactions. Police policies and procedures may add unnecessary stresses to officers involved in a shooting. Delays in completing the investigation, a negative attitude, or lack of support from supervisors and/or administration can compound the psychological damage. [Investigations that last several months, even if they clear the involved officer of any wrongdoing, have disrupted families, producing stresses that led to divorce. Civil and criminal court proceedings against officers for shootings] *make psychological intervention more difficult because officers become preoccupied with the legal ramifications of what they say to the psychologist rather than trying to express feelings about the shooting* . . . [emphasis added]

Solomon and Horn (1986) prepared a similar list of 18 distinct types of reactions that officers

> they interviewed had to the trauma of shooting someone. As summarized by Ayers and Flanagan (1990: 7-8), these reactions included: "heightened sense of danger, anger, nightmares, isolation/withdrawal, fear and anxiety about future situations, sleep difficulties, flashbacks/intruding thoughts, emotional numbing, depression, alienation, guilt/sorrow/remorse, the 'Mark of Cain' (an assumption that others blame or shame them), problems with authority figures/rules/regulations, family problems, feelings of insecurity/loss of control, sexual difficulties, alcohol/drug abuse, and suicidal thoughts."

Geller & Scott, *supra*, at 289-290.

Compounding the degree of traumatic psychic injury done to the officer involved in a shooting is the great degree of difficulty encountered in discussing the event with fellow officers or even intimates.

> Some officers involved in shootouts state that they hated all the adulation they received from their fellow officers afterward. One officer says: "You can't really talk to someone who hasn't been there. They want to hear the gory details, not about your problems handling it because it's heavy and it reminds them that it could happen to them." [citation omitted]

H. Russell & A. Beigel, *Understanding Human Behavior for Effective Police Work*, 368-369 (3d. rev. ed. 1990). Similarly, "The stress of the job is so bad sometimes, [one officer] said, that he stays an extra hour at work, just to cool down, before going home. 'A lot of times, I don't tell my wife everything, the most dangerous parts,' he said." P. Reardon & M. O'Connor, *Police Tactical Teams Tempt the Fates Daily*, Chicago Tribune, Jan. 9, 1991, at 1-2.

The consequences of trauma-induced officer stress being bottled up inside a person are tragic: "Post-traumatic stress disorder . . . has inhibited the productivity of officers, led to early retirement, divorces and even suicides of officers involved in a single shooting incident." Geller & Scott, *Deadly Force, supra*, at 75. "For cops, the risk of being killed in the line of duty, scary though it can be, is dwarfed by the risk of what . . . Karl Menninger calls 'death by inches': burnout, alcoholism, divorce, suicide . . . Seventy percent of officers involved in shootings leave police work within five years, mostly because they can't handle the emotional fallout [citations omitted]. *Id.* at 237.

The best hope for officers is that, where it is afforded to those who have experienced traumatic incidents, professional mental health counseling does indeed work to sooth the anguished minds of officers, and salvage to the public a valuable member of society. In a comparative study of the traumatic effects upon rescuers (including police officers) of responding to a major commercial aircraft disaster, researchers looked at the results of two different crashes in San Diego and Cerritos, California. The 1978 San Diego crash killed 125 persons. The 1986 Cerritos crash killed 82 persons. In both cases 15 persons were killed on the ground. In both cases 16 homes were destroyed. In both cases no one survived on the aircraft. In both cases approximately 300 emergency personnel were engaged in a largely futile rescue effort. In both cases emergency personnel were tasked with recovering more than 10.000 individual body parts.

"The San Diego crash had limited and sporadic psychological briefings for those that responded to the crash site. The Cerritos crash had twelve support teams working. All the police, firefighter and emergency service workers were seen by a team within three days of the crash. They were taken away from the site and had intense follow-up for six months. In addition, there was a hotline installed so that first responders could call 24 hours a day." Am. Police Beat, July/Aug., 1995, at 20. One year later, San Diego, reporting a 1% use of departmental mental health services, saw a total of 5 police, 7 firefighters and 17 rescue workers quit. Cerritos, by way of contrast, reported that 31% of workers used the departmental mental health services provided, and saw only 1 police officer, 1 firefighter and 1 rescue worker depart. *Id.*

The Federal Bureau of Investigation (F.B.I.) has also published findings emphasizing the necessity for early psychological intervention in officer-involved shooting situations. A 1986 F.B.I. study of post-traumatic shooting reactions recommended treatment components for officers involved in a line-of-duty shooting and included the following: ". . . Provide physical *and mental* first aid . . . Provide a psychological break for the officer before the detailed interview . . . Provide *mandatory counseling* within one to two days." T. H. Blau, *Psychological Services for Law Enforcement* 179 (1994) [emphasis added].

Amicus curiae the National Association of Police Organizations, Inc. submits that the practical availability of effective professional mental health counseling for America's police officers is essential to modern police work and individual as well as departmental police wellbeing. It thus is of crucial importance to the public, which increasingly relies so heavily on our police.

II. ASSURED CONFIDENTIALITY IS ESSENTIAL TO EFFECTIVE COUNSELING.

Other organizations filing briefs *amicus curiae* in this matter possess greater institutional expertise with which to address the issue of confidentiality as an essential therapeutic requirement for the successful mental health counseling of any given individual who has encountered traumatic and traumatizing circumstances. The National Association of Police Organizations, however, does wish to briefly address the particular concerns of police officers with respect to professional mental health counseling following a traumatic incident.

As discussed in Argument I above, the desirability of providing and encouraging use of professional mental health counseling services to police officers is clear. But a notion that is implicit in the recognition of this desirability is that what is desired is *effective* counseling *for police*.

It has been recognized that confidentiality within the mental health professional-client relationship is an important contributing factor to the efficacy of that relationship. "[C]onfidentiality and privilege laws appear to create a shield of privacy around the psychologist [and psychotherapist]-patient relationship which increases the self-disclosure of patients in therapy and also encourages persons to seek psychotherapy." S. Knapp & L. VandeCreek, *Privileged Communications for Psychotherapists in Federal Courts*, 6(2) Psychotherapy in Pvt. Prac. 69 (1988). Psychiatric patients in treatment have been found to value confidentiality highly and to be concerned about the possibility of unauthorized disclosures. D. Schmid, P. Appelbaum, L. Roth & C. Lidz, *Confidentiality in Psychiatry: A Study of the Patient's View*, 34(4) Hospital and Community Psychiatry 353 (1983). Aside from the subjective view of patients, a recent sampling of judges, therapists, and laypersons (as well as patients) in both the United States and Canada found that a lack of a psychotherapist-patient communication privilege reduced the willingness of patients to discuss certain issues in therapy. D. Shuman, M. Weiner & G. Pinard, *The Privilege Study (Part III)*, 9 Int'l J. of L. & Psychiatry 393 (1986). The utilitarianism of confidentiality in the therapeutic setting has been found to be equally important to both inpatient and outpatient clients. P. Appelbaum, Kapen, Walters, C. Lidz & L. Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12(2) Bull. of the Am. Acad. of Psychiatry & the L. 109 (1984).

The common-sense notion that reluctance to frankly discuss one's intimate thoughts about an occurrence impedes the "subtle process of therapy" regarding that occurrence has

been persuasively argued. P. Appelbaum, *What Patients Don't Tell Their Therapists*, 2 Integrative Psychiatry 35 (1984). So, too, has been the justification on moral grounds of a legally cognizable psychotherapist-patient privilege since it is morally appropriate to shield the confidences of people in anguish. *Id.*

In police work, the normal patient concerns regarding confidentiality are greatly magnified by the nature of the work. Police officers in general serve in a rigidly administered para-military organization. They are subject to extensive and continuing review of almost every aspect of their personal and professional lives. In a democracy such as ours, there exists a fundamental suspicion of those empowered to execute the dictates of the law, by force if necessary. Following a critical incident such as the use of deadly force against another human being, the level of intrusive and suspicious scrutiny only increases. Homicide detectives, internal affairs investigators, state and federal prosecutors, civil attorneys and the media can be expected to probe every aspect of the officer's conduct, both past and present. A diminishing but still present attitude on the part of some supervisory personnel is that asking for help (especially psychotherapeutic counseling) is a sign of weakness or instability on the part of the officer. "A police executive whose words or deeds make it clear that employees who admit any weakness will be considered unfit for duty and penalized in subtle or not so subtle ways should not be surprised when few employees step forward to seek help." W. Geller & M. Scott, *Deadly Force: What We Know*, 289 (1992). In this context, it is understandable that officers would be reluctant to seek professional mental health assistance if they believed their confidences might one day be revealed.

More progressive and enlightened police departments, like the one serving Respondent Village of Hoffman Estates, have addressed the dual concerns of the necessity for counseling for officers who have been involved in a use-of-deadly-force incident and the need for confidentiality if that counseling is to be effective by instituting routine referral of officers to licensed mental health professionals. By making the referral routine, much of the stigma formerly associated with seeking help is removed. The need for counseling is satisfied; and in the present case, assurances of confidentiality under Illinois law promote the efficacy of the counseling sessions. Illinois Mental Health and Developmental Disabilities Confidentiality Act, Ill. Ann. Stat. Ch. 91 1/2, § 810(a) (Smith-Hurd 1993).

Such far-sighted assistance to police officers is enthusiastically supported by police officers' associations, and makes good business sense to the employing agencies. Previously an officer troubled by a traumatic incident might simply be shunned or quietly eased out of the department. S. Baltic, *Be Careful Out There*, Reader: Chicago's Free Weekly, Nov. 22, 1991, at 29. The more accurate and intelligent approach, both pragmatically and morally, is to affirmatively assist the officer involved. It has been no small leap institutionally for police departments to acknowledge that their officers will frequently experience events that would gravely trouble any sentient being. Counseling the officer involved not only serves the moral goal of alleviating suffering; it also salvages and puts to good public use the knowledge, experience and training invested in a veteran police officer. Gradually, but perceptibly, post-critical incident counseling for police has come to be accepted as a "workable and important

method for reducing the career risks confronting police officers." W. Geller & M. Scott, *Deadly Force, supra*, at 339-40. *Accord*, W. Geller, *Officer Restraint in the Use of Deadly Force*, 13 J. of Police Sci. & Admin. 153 (1985), W. Geller, *Crime File: Deadly Force: A Study Guide* (1986), K. Matulia, *A Balance of Forces: Model Deadly Force Policy and Procedure* (2d. rev. ed. 1985).

Given the extraordinary pressures and stresses of modern police work, and the potential for loss, both personal and public, inherent in forcing officers to "go it alone", the demonstrated need for confidentiality in counseling may well be more crucial in assisting and salvaging patients who happen to be law enforcement officers than for any other cognizable group of patients. In any event, the treatment by United States Courts of psychotherapist-patient communications as privileged is clearly called for not just "in light of reason and experience", but by the strongest moral, practical, pragmatic and compassionate terms.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations, Inc. respectfully requests that the Court affirm the judgement in this case of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted this 2nd day of January, 1996,

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OCTOBER TERM, 1995

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BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The American Psychiatric Association (APA), with approximately 42,000 members, is the Nation's leading organization of physicians specializing in psychiatry. The APA has participated as *amicus curiae* in numerous cases involving mental-health issues in this Court, including *Riggins v. Nevada*, 112 S. Ct. 1810 (1992), *Washington v. Harper*, 494 U.S. 210 (1990), *Allen v. Illinois*, 478 U.S. 364 (1986), *Ake v. Oklahoma*, 470 U.S. 68 (1985), *Barefoot v. Estelle*, 463 U.S. 880 (1983), *Youngberg v. Romeo*, 457 U.S. 307 (1982), *Estelle v. Smith*, 451 U.S. 454 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979),

Addington v. Texas, 441 U.S. 418 (1979), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975). The American Academy of Psychiatry and the Law, with approximately 1700 members, is devoted to issues at the intersection of psychiatry and the law. With the APA, the Academy participated as an *amicus* in *Smith v. Murray*, 477 U.S. 527 (1986). The members of both organizations have a strong and direct interest in the federal courts' recognition of a psychotherapist-patient privilege that will protect the compelling interest of patients in the confidentiality of treatment-related communications.[1]

SUMMARY OF ARGUMENT

Rule 501 of the Federal Rules of Evidence assigns to the federal courts the responsibility to use their reason and experience to recognize and to shape evidentiary privileges according to the traditional standards for such privileges. The Court has several times confirmed the flexibility of that authority (*e.g., Trammel v. United States*, 445 U.S. 40, 47 (1980); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.25 (1984)), and such flexibility is unmistakable from the legislative history of Rule 501, which Congress adopted precisely to avoid freezing the law of privilege in place. Rule 501's flexible authority, however, is to be exercised within the bounds set by traditional standards. The Court thus has made clear that any privilege must be carefully justified to ensure that the interests thereby protected are sufficient to outweigh any loss of reliable and probative evidence. *Trammel*, 445 U.S. at 50-51.

A psychotherapist-patient privilege for confidential communications is readily justified—based on the best possible objective sources—under this established standard. Rule 504 of the rules that were proposed to Congress specifically recognized the privilege. And every State in the Nation now recognizes the privilege. Professional understanding and ethical rules confirm the basis for this consensus: it is intrinsic to the process of psychotherapy that patients make personal, revealing statements (whether true or false); and breach of therapeutic privacy would predictably work serious harm to the patient, to other people, and to the public interest in ensuring that people seek and obtain needed effective mental-health treatment—an interest that is acutely obvious, and well recognized, in the context of post-trauma therapy for police officers. Denying a privilege thus would invade patients' (and others') privacy and produce patent harms to a valuable confidential relationship—a common-sense conclusion that is amply supported, and nowhere soundly contradicted, by available evidence. Particularly because the reliable evidentiary benefits from disclosing statements made in the course of therapy are often very weak, the social interest in protecting therapeutic confidences—confirmed in the uniform consensus of the States—justifies the privilege.

No exception to the privilege applies in this case, whether a particular State's law is incorporated to give content to the federal common law of privilege, whether state law is looked to generally, or whether the present circumstances are assessed independently. It is important, as this Court recognized in the attorney-client context (*Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)), that any exceptions should be clearly defined and categorical, so that the ability to rely on confidentiality when undertaking therapy is not destroyed by the prospect of later ad hoc, individual-case balancing, which could generate an uncertainty that litigants would exploit to make the real-world price of claiming the privilege prohibitive. Here, Illinois law would recognize the privilege; none of the familiar exceptions to the privilege applies; and the circumstances of a police shooting—where the need for confidential therapy is sharp and other sources of evidence are routinely available—provide no reason for an exception. Nor does the fact that the therapist in this case happened to be a clinical social worker, licensed to perform psychotherapy by the State, support rejection of the privilege. In this case, in short, the claim of privilege was properly upheld by the court of appeals.

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[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of this Court. Neither *amicus* has any parent or subsidiary companies.

ARGUMENT

I. THIS COURT SHOULD RECOGNIZE A PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER FEDERAL RULE OF EVIDENCE 501

A. Rule 501 Directs the Development of a Federal Common Law of Privileges According to Reason and Experience

Rule 501 of the Federal Rules of Evidence provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[2] As petitioner acknowledges (Pet. Br. 11), this provision directs the federal courts to develop and refine privileges by applying the "principles" (not the "privileges") of the common law. This Court has accordingly explained that "Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with flexibility to develop rules of privilege on a case-by-case basis,' and to leave the door open to change." *Trammel v. United States*, 445 U.S. 40, 47 (1980) (quoting 120 Cong. Rec. 40891 (1974) (Rep. Hungate) and citing S. Rep. 1277, 93d Cong., 2d Sess. 11 (1974); H.R. Rep. 650, 93d Cong., 1st Sess. 8 (1973)). *See also id.* at 47 n.8 ("In Rule 501 Congress makes clear that [former 28 U.S.C.] § 2076 was not intended to prevent the federal courts from developing testimonial privilege law in federal criminal cases on a case-by-case basis 'in light of reason and experience'; indeed Congress encouraged such development.").

The Court confirmed the authority under Rule 501 to adopt new privileges, without rigid limit to those few privileges that had their origin in "common law," in *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984), where the Court acknowledged the existence of a privilege for certain communications made to government safety investigators, explaining that Rule 501 "recognizes the power of the courts to fashion common-law rules of privilege." *Id.* at 803 n.25. The absence of a limitation in Rule 501 to those privileges first recognized by courts rather than legislatures was again confirmed by the Court's approach in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). Not questioning its power to "create and apply an evidentiary privilege" for academic peer-review communications (which were not protected at common law), the Court acknowledged Congress's intent "to provide the courts with flexibility to develop rules of privilege on a case-by-case basis" (*id.* at 189) and then explained in detail why it would not create the particular proposed privilege (*id.* at 189-95). The entire privilege-specific discussion in the case would have been pointless if Rule 501 authority were limited to those few privileges existing at common law.

Rule 501's flexibility is evident in the path by which it came to be adopted. This Court proposed a specific set of privileges for the new Federal Rules of Evidence (some common-law in origin, others not), together with a proposed Rule 501 that would have limited privileges to that list plus any other privileges "required by the Constitution . . . or provided by Act of Congress." *See* 56 F.R.D. 183, 230 (1973); 2 J. Weinstein & M. Berger, *Weinstein's Evidence* at 501-2 to 501-3 (1993). Congress rejected that approach and instead "substituted the present language

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[2] The second sentence of Rule 501, which applies state law to the question of privilege with respect to a claim or defense governed by a state rule of decision, is not at issue at this stage of the present case.

. . . to provide the courts with greater flexibility in developing rules of privilege on a case-by-case basis." *United States v. Gillock*, 445 U.S. 360, 367 (1980). Had Congress wished to limit the courts' authority to the task of modifying those privileges with a common-law origin, it could easily have identified those privileges and said so. Instead, in adding the reference to the "principles of the common law as they may be interpreted . . . in the light of reason and experience" to the references to the Constitution and federal statutes, Congress decided that "the courts may continue to develop privileges, as well as formulate new privileges on a case by case basis." *Weinstein's Evidence* at 501-3.

The House Committee specifically explained that, in "eliminat[ing] all of the Court's specific Rules on privileges," it "left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard," which, it noted, "derived from Rule 26 of the Federal Rules of Criminal Procedure." H.R. Rep. 650, *supra*, at 8. The identified source confirms the flexibility of the Rule 501 standard, for the former Fed. R. Crim. P. 26 was promulgated on the expressed understanding that its standard "does not fetter the applicable law of evidence to that originally existing at common law. It is contemplated that the law may be modified and adjusted from time to time by judicial decisions." Notes of Advisory Committee (1944). The Senate Committee in 1974 also made explicit the intended flexibility, noting that its Rule 501 provided for "a federally developed common law based on modern reason and experience." S. Rep. 1277, *supra*, at 11.[3]

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[3] This aspect of Rule 501 was uncontroversial. The House and Senate took different approaches to deciding when state law would govern a privilege issue, with the Conference Committee ultimately adopting the House position. H.R. Conf. Rep. 1597, 93d Cong., 2d Sess. 7-8 (1974).

As petitioner recognizes, this contemplation of flexibility in developing "federally evolved rules on privilege" (*id.* at 12) makes senseless any effort to limit the Rule 501 authority to the task of expanding (or modifying) those privileges that had their origin in judge-made law. No policy evident in Rule 501 makes relevant whether a particular privilege had its origin in the courts as opposed to legislatures (which may itself vary among different common-law jurisdictions). Which privileges originated in which branch of government is often an accident of historical timing and has nothing to do with whether a particular privilege is justified based on "reason and experience." And the fact that "during the 19th century the source of newly created privileges shifted decisively from the courts to the legislatures" (E. Cleary, *McCormick on Evidence* § 75, at 180 (3d ed. 1984)) cannot control Rule 501, which decisively rejects the idea that privilege-recognizing authority is reserved to Congress and instead directs the *courts* to develop privilege law.[4]

Any limitation of Rule 501 to those privileges existing at common law would, in fact, be inconsistent with specific congressional statements about the psychotherapist-patient privilege, which—like, for example, a journalist-source privilege, doctor-patient privilege, and clergy-penitent privilege—is not of common-law origin. *See* S. Stone & R. Taylor, *Testimonial Privileges* § 6.02 (clergy), § 7.01 (physicians and psychotherapists), § 8.02 (journalists) (2d ed. 1993).[5] The Senate Committee explained that Congress "should not be understood as disapproving any recognition of a psychiatrist-patient" privilege, a statement that makes no sense if Rule 501 authority is limited to common-law privileges. S. Rep. 1277, *supra*, at 13.[6]

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[4] 28 U.S.C. § 2074(b) provides that this Court may not use its *rulemaking* power to create, abolish, or even modify an evidentiary privilege without congressional approval. That provision merely "carries forward" the same limitation in former 28 U.S.C. § 2076. H.R. Rep. 422, 99th Cong., 1st Sess. 27 (1985). The Court held in *Trammel* that this limitation does not apply to the Court's authority under Rule 501. 445 U.S. at 47 n.8 (quoted at pages 4-5, *supra*).

[5] A psychotherapist-patient privilege would not have been at issue in early common law, because the treatment did not come into

Rule 501, in short, authorizes the recognition of privileges if justified by "reason and experience" applied to the long-established "principles" governing this issue. The authority, of course, must be "strictly construed" (*Trammel*, 445 U.S. at 50) to ensure that a privilege is recognized only if it " 'promotes sufficiently important interests to outweigh the need for probative evidence.' " *University of Pennsylvania*, 493 U.S. at 189 (quoting *Trammel*, 445 U.S. at 51). But at least where that determination can be made on the basis of objective evidence to guide the courts' inquiry, the standard of Rule 501 is met.

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general use until well into this century. By then, the *doctor*-patient privilege had become a fixture of state *statutory* law. *See* Chafee, *Privileged Communications: Is Justice Served or Obstructed By Closing the Doctor's Mouth on the Witness Stand?*, 52 Yale L.J. 607, 607 (1943) (all but 17 States recognized doctor-patient privilege in 1943). For psychiatrists, that privilege was the original basis for the psychotherapist-patient privilege. Even so, the Advisory Committee responsible for the proposed Federal Rules of Evidence wrote: "While the common law recognized no general physician-patient privilege, it had indicated a disposition to recognize a psychotherapist-patient privilege, Note, Confidential Communications to a Psychotherapist: A New Testimonial Privilege, 47 Nw.U.L.Rev. 384 (1952), when legislatures began moving into the field." 56 F.R.D. at 242. And a number of state courts adopted a privilege either before or broader than any statutory enactment. *See, e.g.*, *In re B*, 394 A.2d 419 (Pa. 1978); *Falcon v. Alaska Pub. Offices Comm'n*, 570 P.2d 469 (Alaska 1977); *Allred v. State*, 554 P.2d 411 (Alaska 1976); *State v. Evans*, 454 P.2d 976 (Ariz. 1969).

Notably, the attorney-client privilege, though of common-law origin, is now governed by statute in almost all States. S. Stone & R. Taylor, *supra*, § 1.06.

[6] This Court in *Trammel* specifically noted the important values protected by the non-common-law "privileges between priest and penitent . . . and physician and patient." 445 U.S. at 51.

B. A Psychotherapist-Patient Privilege Is Justified by Reason and Experience

The basic standards governing whether a privilege should be recognized are clear, turning here on whether the injury from breach of psychotherapist-patient confidences outweighs any evidentiary benefits. The Court has noted the significance of whether—as is undisputed here—the communications are confidential in character. *Trammel*, 445 U.S. at 51. The Court also has indicated the importance, in making this determination, of whether support exists in the legislative history leading to the Federal Rules of Evidence (*Gillock*, 445 U.S. at 368 n.7) and whether state law recognizes the privilege (*id.* at 368 n.8; *Trammel*, 445 U.S. at 48-50). *See also In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983) (conditions for privilege: confidentiality expected, and essential to relationship worth fostering, with litigation benefits outweighed by harm from disclosure) (citing 8 J. Wigmore, *Evidence* § 2285, at 527 (McNaughton rev. 1961)). Following this approach, the Court should recognize that in the case of psychotherapist-patient communications, no less than in the case of attorney-client communications, the compelling evidence is that protection of the confidential relationship through a privilege justifies any loss of probative evidence.[7]

1. *The Proposed Rules.* Among the nine specific privileges adopted by the Judicial Conference and pro-

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[7] Petitioner cites, as rejecting a privilege, several decisions that in fact involved no holding as to privilege under Rule 501 or any predecessor. Pet. Br. 14. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (no Rule 501 issue; ruling as to "clear intent of Congress" under 26 U.S.C. § 7602 with respect to accountants' work papers); *Herbert v. Lando*, 441 U.S. 153 (1979) (First Amendment issue); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (First Amendment issue in state-court case); *Couch v. United States*, 409 U.S. 322 (1973) (Fourth and Fifth Amendment issues decided; noting in passing lower court precedent declaring no accountant privilege; no apparent dispute on that issue).

posed by this Court in 1972 was a psychotherapist-patient privilege. *See* Proposed Rule 504, 56 F.R.D. at 240. The Advisory Committee observed that "many of the [state] statutes simply place the communications on the same basis as those between attorney and client." *Id.* at 243. And the Committee, though taking a generally very restrictive view of the circumstances justifying any federal privilege (*see* ***Weinstein's Evidence*** ¶ 501[06]), nevertheless explained that its "doubts attendant upon the general physician-patient privilege are not present when the relationship is that of psychotherapist and patient" and that even Professor Wigmore's stringent "conditions needed to justify the existence of a privilege are amply satisfied." 56 F.R.D. at 242.

The Committee set forth its rationale as "convincingly stated in Report No. 45, Group for the Advancement of Psychiatry 92 (1960)":

> "Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment."

56 F.R.D. at 242. The Committee also endorsed the "more extended exposition of the case for the privilege" in Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 184 (1960). *Ibid.*

Congress ultimately decided, of course, not to adopt any specific privileges. That action, however, no more suggests or supports rejection of the psychotherapist-patient privilege of Proposed Rule 504 than, say, of the attorney-client privilege of Proposed Rule 503 or of the clergy-pentient privilege of Proposed Rule 506. To the contrary, the Senate Committee pointedly explained:

> The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. Rep. 1277, *supra*, at 13.

2. *Legal Consensus*. The need for the privilege reflected in the Proposed Rules is compellingly confirmed by the law in the States today. As with the attorney-client privilege, a psychotherapist-patient privilege is uniformly recognized, without exception, by every State in the Nation. *See* Pet. App. 20a; Pet. Br. 31 ("At the present time, every state and the District of Columbia appears to have adopted some protection for confidential communications with a psychiatrist or a clinical psychologist.")[8]; S. Stone & R.

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[8] Petitioner follows that statement with a footnote (Pet. Br. 31 n.45) incorrectly doubting the existence of a privilege in West Virginia. *See Allen v. Smith*, 368 S.E.2d 924, 926 (W.Va. 1988). Petitioner also says that "[n]o state has adopted the broad privilege fashioned by the Court of Appeals in this case." Pet. Br. 31. But that is a false characterization: the court of appeals expressly

Taylor, *supra*, § 7.01; Howell & Ogles, *Psychologist-Client Privileged Communications Laws for the Fifty States: Duty to Report, Duty to Warn*, 7 Am. J. Forensic Psychology 5 (1989). The States thus have unanimously judged that a privilege is warranted because of the general overriding importance of protecting confidential communications against disclosure in legal proceedings.[9]

The unbreached consensus of the States is bolstered by the reasoning of each of the federal courts of appeals that have given full consideration to the issue. Like the Seventh Circuit in this case, the Second and Sixth Circuits, after thorough analysis, determined that the privilege is justified, because the privacy interests of patients in therapeutic communications demand it.[10] By contrast, the several circuit-court opinions cited by petitioner as rejecting any such privilege (Pet. Br. 20 n.28; Pet. 8) either do not do so, incorrectly find Rule 501 limited to privileges existing at common law, or merely assert the conclusion without any consideration.[11] Thus, the federal

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"decline[d] to speculate" about the contours of the privilege and declared that its ruling was "confine[d] . . . to a factual situation of this nature" (Pet. App. 22a); and petitioner has not pointed to any recognized exception to the privilege that applies in this case (Pet. Br. 32-35).

[9] The natural counterpart to this consensus is the common recognition that psychotherapists may be liable under state law for breach of confidentiality. *See, e.g.*, J. Smith, *Medical Malpractice: Psychiatric Care* §§ 10.20-10.21 (1986); Annotation, *Physician's Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 A.L.R. 4th 668; *Horne v. Patton*, 287 So.2d 824 (Ala. 1973); *Doe v. Roe*, 400 N.Y.S.2d 668 (Sup. Ct. 1977); *Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793 (N.D. Ohio 1965); *Hague v. Williams*, 181 A.2d 345 (N.J. 1962); *McDonald v. Clinger*, 446 N.Y.S.2d 801 (App. Div. 1982); *Allen v. Smith*, 368 S.E.2d 924 (W.Va. 1988); *Alberts v. Devine*, 479 N.E.2d 113 (Mass.), *cert. denied*, 474 U.S. 1013 (1985).

[10] *In re Zuniga*, 714 F.2d 632, 637 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983); *In re Doe*, 964 F.2d 1325 (2d Cir. 1992).

[11] *Slakan v. Porter*, 737 F.2d 368, 377 (4th Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985), contains one sentence on the issue, which

courts of appeals, to the extent that they have been applied their "reason and experience," have accepted rather than rejected the privilege.

The overwhelming consensus on the issue is the best possible basis for this Court's decision: it provides a readily ascertainable objective foundation for determining how "reason and experience" weigh the importance of protecting the psychotherapist-patient relationship against disclosure. The existence of that consensus also makes it possible to eliminate most if not all of the potential for forum-shopping that would exist if the federal courts rejected, while all States accepted, the privilege at issue. Whatever variation in detail exists on the contours of the privilege, there is no dissent on the basic question presented for decision here: should a privilege exist? This Court should follow this state-law consensus. *See also* note 18, *infra* (noting possibility of incorporating some state law to give content to federal-common-law privilege).

3. *Professional Understanding*. Like the States, psychiatrists have long recognized the compelling need to protect confidential communications against disclosure

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declares the law "well-settled" and cites a decision that only (and briefly) ruled on the *physician*-patient privilege (*United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976)). *United States v. Moore*, 970 F.2d 48, 50 (5th Cir. 1992), notes simply that earlier precedent rejecting a *doctor*-patient privilege is binding, but then goes on to explain that even if a privilege existed, it should not cover the patient's identity or the fact or time of his treatment. *In re Grand Jury Proceedings*, 867 F.2d 562, 564-65 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989), holds (with no analysis) that Rule 501 is limited to privileges extant at common law. *United States v. Burtrum*, 17 F.3d 1299, 1301-02 (10th Cir.), *cert. denied*, 115 S. Ct. 176 (1994), decides "only the narrow question of whether to recognize a psychotherapist/client privilege in a criminal child sexual abuse context." And *Hancock v. Hobbs*, 967 F.2d 462, 466 (11th Cir. 1992), contains precisely one sentence on the issue, which declares that "[f]ederal common law does not recognize a psychiatrist-patient privilege," followed by a citation to a footnote from a constitutional decision of this Court (*Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977)) where the Court noted that the *physician*-patient privilege was not recognized at common law.

and enforced that recognition through ethical principles that reach as far back as the Hippocratic Oath.[12] Thus, the APA's code of ethics, *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* (1995), requires a physician to "safeguard patient confidences within the constraints of the law" and declares: "Psychiatric records, including even the identification of a person as a patient, must be protected with extreme care. Confidentiality is essential to psychiatric treatment. This is based in part on the special nature of psychiatric therapy as well as on the traditional ethical relationship between physician and patient." Section 4 and note 1; *see ibid.* (referring to "the sensitive and private nature of the information with which the psychiatrist deals"). "Keeping patients' confidences is part of a psychiatrist's ethical and legal duty. Any breach . . . may lead to admonishment, reprimand, suspension, or even expulsion. In a number of states, breach of confidentiality may also be judged to be unprofessional conduct and grounds for suspension or revocation of the psychiatrist's license to practice medicine." APA, *Guidelines on Confidentiality*, 144 Am. J. Psychiatry 1522, 1522 (1987). As petitioner recognizes, comparable ethical principles govern other mental-health professions. *See* Pet. Br. 26 n.33.

The strength and uniformity of these duties are simply inexplicable other than as reflections of the deepest belief, confirmed daily in the conduct of therapy, that effective therapy requires protection against disclosure. *See, e.g.*, Beigler, *supra*, at 221 ("The psychiatrist, by the nature of his work, becomes privy to sensitive information of high potential value to, among others, employers, creditors, legal adversaries, law-enforcement agencies, and

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[12] The Hippocratic Oath, in one translation, states: " 'All that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal.' " *See* Beigler, "Psychiatric Confidentiality and the American Legal System: An Ethical Conflict," in *Psychiatric Ethics* 220 (S. Bloch & P. Chodoff eds. 1981).

insurance carriers. Yet he cannot perform his work properly unless he can assure his patient of real confidentiality."); S. Halleck, *Law in the Practice of Psychiatry* 30-31 (1980) ("There is general agreement among all writers in the medical malpractice field that confidentiality is an important right of a patient and that the physician is obligated not to breach the patient's confidences. There is complete agreement that confidentiality is even more important in psychiatric practice. . . . [M]ost doctors, and especially psychiatrists, are very careful in protecting the patient's confidences."); Diamond, "Forensic Psychiatry," in *Review of General Psychiatry* 467 (3d ed., H. Goldman ed., 1992) ("There is no disagreement that eftive psychotherapy requires a trusting relationship between patient and therapist. The foundation of that trust is the patient's belief that the therapist will maintain the confidentiality of their communications. If the therapist is required by law to breach that confidentiality, therapy becomes difficult, if not impossible. An enforced demand for breach of confidentiality with respect to one patient's communications may affect all patients, for the others may cease to believe—and rightly—that their confidences will be kept confidential."); Ciccone, *Privilege and Confidentiality: Psychiatric and Legal Considerations*, 2 Psychiatric Med. 273, 273 (1985) ("The practice of psychiatry requires the development of a therapeutic alliance between physician and patient; a significant cornerstone to this alliance is the patient's expectation that the psychiatrist will keep secret what is learned about the patient. . . . Privacy, an important component of the doctor-patient relationship in all branches of medicine, is of particular relevance to psychiatry because it is necessary that patients share with the psychiatrist their fears, fantasies, and foibles.") (footnote omitted).

The rationale is not hard to fathom, as it is a particularly strong version of what this Court recognized in *Trammel*, 445 U.S. at 51, about the physician-patient relationship: "the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." As explained in one of the sources cited by the Advisory Committee responsible for the Proposed Rule 504: "The very essence of psychotherapy is confidential personal revelations about matters which the patient is and should be normally reluctant to discuss. Frequently, a patient in analysis will make statements to his psychiatrist which he would not make even to the closest members of his family." Slovenko, 6 Wayne L. Rev. at 184-85.[13] This rationale was recognized by the Advisory Committee responsible for the 1972 Proposed Rules. *See* page 10, *supra.* Even without reference to the need to explore the deepest, unconscious aspects of a patient's psyche, the basic point about the need for confidentiality applies not just to "analysis" in a limited sense but to psychotherapy generally.

Common sense and wide experience show why. People enter into therapy when something is troubling them and, in the course of the therapy, commonly talk about a wide range of matters that, if disclosed, could produce acute embarrassment, destruction of vital relationships, or other damaging consequences to them or others. Patients may talk about a "relationship problem" (as in this case, *see* JA 70-71), about spouses or other family members, about sexual orientation or relations, about employers or coworkers or friends or teachers. In doing so, patients often discuss not only themselves and their initimate feelings and private actions, but also those of other people with whom their lives are intertwined. The reverberations from disclosure of such information—for the patients and for

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[13] Petitioner incorrectly suggests that Professor Slovenko has somehow recanted his account of the importance of confidentiality. Pet. Br. 42. The cited letter to the editor offers a cursory *description* of existing case law, conveying frustrated disappointment at the *extent* of the recognized privilege; it does not indicate any lack of conviction about the need for strong protection. Slovenko, *Letter*, 151 Am. J. Psychiatry 626 (1994).

third parties—obviously can be severe, indeed life-altering, whether in the form of divorce, impairment of relations with parents, siblings, or friends, loss of employment, or any number of other adverse consequences that flow readily from the breach of privacy.

Given that such private information is and must be regularly revealed in psychotherapy and that serious harm would often result from its disclosure, it would require a perverse calculation of human incentives to deny that elimination of the privilege would impair psychotherapy, and hence undermine what the best scientific and professional judgments prescribe for the beneficial treatment of many mental-health problems. Patients for whom there was some realistic chance of participation in legal proceedings would inevitably have second thoughts about seeking therapy at all and, if they overcame that reluctance, feel guarded about what they say in therapy; they would need to worry about how any of the statements they make in therapy would sound if taken out of context, leading them either to withhold information or to take steps to "protect the record." Therapists, for their part, would have to think twice about what they write in their records and whether they should sacrifice the degree of completeness counseled by their professional judgment for the alternative benefits of protecting their patients against risks of disclosure.

Without any privilege, the threat of disclosure in a wide range of legal proceedings, from divorce proceedings to employment-discrimination litigation, would be substantial. The threat would be particularly grave if, as petitioner urges, the patient's offering of testimony in any legal proceeding would justify examination of the whole psychotherapist-patient interaction to determine whether the patient's testimony may have been influenced by the course of therapy. The significant potential for intimidation through the threatening of such disclosures could not effectively be controlled without a clear and strong (not to say absolute) privilege.

The predictable result of rejecting a privilege, then, would be not only to breach one of the important remaining spheres of personal privacy,[14] but also to inflict transformative injury on the psychotherapeutic relationship and hence on mental-health care. The real-world human harm would be palpable. The high value of such care is reflected in the fact that it is covered by virtually every health-insurance program in this country. *See* Sharfstein, Muszynski & Arnett, *Dispelling Myths About Mental Health Benefits*, Bus. & Health, Oct. 1984, at 7. That pervasive coverage itself reflects the fact that psychotherapy has repeatedly been shown to be effective in ameliorating symptoms that, for many people, impair their ability to work, maintain basic family relations, and carry out their daily functions. *See* M. Smith, G. Glass & T. Miller, *The Benefits of Psychotherapy* 124 (1980); Elkin *et al.*, *National Institute of Mental Health Treatment of Depression Collaborative Research Program*, 46 Archives of Gen. Psychiatry 971 (1989); Mumford & Schlesinger, *Assessing Consumer Benefit: Cost Offset as an Incidental Effect of Psychotherapy*, 9 Gen. Hosp. Psychiatry 360 (1987). "Society . . . has a discernible interest in fostering the therapeutic treatment of those of its members experiencing emotional turbulence. This interest consists not only in our altruistic concern for our neighbors' well-being, but in our more selfish interest in the effective treatment of those in the community who may pose a threat because of mental illness or drug addiction." *In re Grand Jury Subpoena*, 710 F. Supp. 999, 1010 (D.N.J. 1989).

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[14] This aspect of what is protected by the privilege has constitutional roots. *See, e.g., Whalen v. Roe*, 429 U.S. 589 (1977) (informational privacy); *Doe v. Bolton*, 410 U.S. 179, 197 (1973) (doctor-patient relationship in abortion context); *Hawaii Psychiatric Soc. v. Ariyoshi*, 481 F. Supp. 1028 (D. Haw. 1979); *In re Lifschutz*, 467 P.2d 557, 567 (Cal. 1970). The court of appeals here noted: "courts and commentators have focused on an individual's right of privacy, 'a fundamental tenet of the American legal tradition,' to justify the psychotherapist/patient privilege. . . . 'Privacy serves several functions: it allows room for personal autonomy, it permits necessary emotional release, and it promotes free self-evaluation. The privacy rationale, however, regards the privacy of individuals as important not only in fostering these ends, but also as an end in itself. Compelled disclosure is considered inherently wrong because it inflicts two distinct kinds of harm: (1) the embarrassment of having secrets revealed to the public, and (2) the forced breach of an entrusted confidence.'" Pet. App. 19a (quoting *Developments in the Law—Privileged Communication: Part IV*, 98 Harv. L. Rev. 1530, 1544-47 (1985)).

The circumstances of this case illustrate the commonsense, accepted understanding of the need for confidential therapy. "The importance of early psychological intervention following a traumatic event has been widely accepted in working with law enforcement and other emergency personnel." Havassy, "Critical Incident Debriefing: Ritual for Closure," in *Critical Issues in Policing* at 139 (U.S. Dep't of Justice 1991). Thus, police departments now widely provide formally established post-trauma treatment programs. *See* McMains, "The Management and Treatment of Postshooting Trauma: Administration and Programs," in *id.* at 191, 194 (100% of large departments and 69% of small departments); Reese & Hodinko, "Police Psychological Services: A History," in *id.* at 297. Because litigation will routinely be on the officer's mind in this situation,[15] and the very subject of the counseling is the incident giving rise to the litigation, in such "critical incident counseling, . . . [c]onfidentiality is of the utmost importance." T. Blau, *Psychological Services for Law Enforcement* 183 (1994). *See* J. Brown & E. Campbell, *Stress and Policing: Sources and Strategies* 43-44, 54, 113-14 (1994). As the court of appeals observed in this case, Redmond's "ability, through counseling, to work out the pain and anguish undoubtedly caused by [Ricky] Allen's death in all probability depended to a great deal upon her trust and confidence in her counselor." Pet. App. 23a. Elimination of the privilege thus would pose a direct threat to the widely accepted importance of post-trauma therapy in the present setting—for the police officers themselves, for their colleagues joining them in the line of duty, and for the public being served.

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[15] Here, for example, petitioner's lawsuit was filed one week after the shooting (JA 1, 9) and respondent Redmond began her counseling "approximately a week or so after the shooting" (JA 100).

Petitioner makes one brief attempt to suggest that there is a basis in the literature for rejecting the common-sense consensus that protection against disclosure is important to psychotherapy. Pet. Br. 28. But petitioner's argument rests on just one set of three studies that cannot remotely support the suggested conclusion: they do not come close to demonstrating—what is facially implausible and not easy to test systematically—that the known absence of a privilege would not influence patients for whom litigation is somehow in contemplation (the only ones who *could* be influenced), either in whether to seek therapy or how they conduct themselves during therapy. To the contrary, to the extent to which they try to isolate the subgroup of patients for whom litigation is relevant, the studies confirm that the privilege does matter; the studies also make clear that, regardless of privilege law, people all but routinely *assume* that their disclosures will be kept secret; and in one case, they show that, despite facial differences, there was in fact no difference in the law of privilege as applied in the two groups being compared.[16]

Not surprisingly, then, other literature post-dating some or all of these studies confirms the importance of the confidentiality guarantee safeguarded by the legal privilege.[17]

4. *Evidentiary Benefits.* The compelling value of confidentiality of therapeutic communications is sufficiently strong to outweigh, in general, any loss of beneficial evidence in legal proceedings. That is particularly so because the evidentiary benefits of breaching therapeutic

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[16] The third of the studies, Shuman, Weiner & Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 Int'l J.L. and Psychiatry 393 (1986), summarizes the results of the earlier studies as well. *See also* Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. Rev. 893 (1982); Weiner & Shuman, *Privilege—A Comparative Study*, 12 J. Psych. & Law 373 (1984). The third study, which compared Quebec and Ontario, found that there was no material difference in the law as applied, because, while Quebec expressly recognized the privilege, Ontario had a *de facto* recognition of protection, so that rates of compelled disclosure were not statistically significant. *Id.* at 409, 411. Obviously, no differential effects on therapy of the nonexistent difference in privilege law could be inferred from this study. And this study confirmed what was also evident in the first two studies: people were unaware of any lack of privilege and in fact counted on therapists to protect their privacy (*id.* at 411-12, 413, 414); confidentiality was an expressed concern for a significant number of patients (*id.* at 414); and "topics with legal consequences were most affected by the absence of a privilege" (*id.* at 413).

[17] *See* Appelbaum *et al., Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psychiatry & Law 109, 115 (1984) (reviewing prior studies, including first Shuman & Weiner study, and showing empirical support for effect of privilege and for fact that people are "overwhelmingly confident that their therapists would protect their privacy"); Taube & Elwork, *Researching the Effects of Confidentiality Law on Patients' Self-Disclosures*, 21 Professional Psychology: Research & Practice 72 (1990) (privilege shown to be important where law is understood and relevant to particular patients); McGuire, Toal, & Blau, *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship*, 16 Professional Psychology: Research & Practice 375 (1985) (patients significantly valued confidentiality); VandeCreek, Miars, & Herzog, *Client Anticipations and Preferences for Confidentiality of Records*, 34 J. Counseling Psych. 62 (1987) (patients strongly value and expect confidentiality); Miller & Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 Professional Psychology: Research & Practice 15 (1986) (same); Cheng *et al., Confidentiality in Health Care*, 269 J. Am. Med. Ass'n 1404 (1993) (confidentiality important to adolescents seeking counseling); *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. Legal Ed. 35, 55 (1994) (willingness of law students to seek assistance for substance abuse depended heavily on guarantee of confidentiality respecting bar admission officials).

privacy will very often be weak, thus further tilting the scales in favor of a privilege. Most simply, statements made in the course of therapy—as in a case of post-trauma counseling—will often be highly misleading if taken out of context and presented (in an adversarial contest) in court. A whole range of possibly contradictory statements can be expected in therapy, perhaps especially in therapy that is aimed at helping a patient work through a wrenching emotional experience that is likely to provoke a powerful sense of guilt, self-doubt, or other strong emotions. Yet such statements present obvious grave risks of unreliability and unfair prejudice when exploited by lawyers in the heat of the battle for legal victory.

To counteract such risks, the therapist might have to offer wide-ranging testimony to try to provide a proper context for assessing therapeutic statements. But such efforts are likely to be fruitless, distracting, and grossly intrusive beyond any possible relevance. The therapist might not only have to explain the dynamics of (her method of) psychotherapy, but also present a full picture of the emotional and psychological context in which particular statements were made. The risks of disclosures not even relevant to the proceedings would be substantial. Thus, breaching a psychotherapist-patient privilege will often make little contribution to, and might even undermine, the judicial system's goal of efficiently and fairly finding facts. The "cost" side of the privilege balance cannot justify the harm to patients' interest in psychotherapy that refusal to recognize the privilege would cause.

II. NO EXCEPTION TO THE PRIVILEGE APPLIES IN THIS CASE

This case presents no occasion for the Court to attempt to sketch the full contours of the privilege. Indeed, the Court recognized in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), that—while a rule requiring balancing

of parties' interests in each and every case can destroy the certainty that a privilege requires (*id.* at 393)—the determination of what *categorical* lines to draw to define the scope of a privilege under Rule 501 is necessarily a task for judicial development in common-law-like fashion. *See id.* at 396 ("Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S Rep No. 93-1277, p 13 (1974) ('the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis')"). The appropriate question for resolution of this case, then, is whether some articulable category justifying an exception to the privilege applies here. The court of appeals properly concluded that no such exception defeats the privilege properly invoked by respondent Redmond.

To begin with, it is essentially undisputed that this case falls outside any of the few familiar categories of exception to the privilege.[18] Thus, the case involves no direct or indirect waiver (by, for example, the patient's placing her mental state in issue in asserting a claim or defense),[19] no threat of imminent harm to others (which might even create a duty to warn on the part of the psychotherapist), and no concerns about child custody or child abuse. *See* Pet. Br. 32-35; Howell & Ogles, *supra*, at 11 (table listing standard exceptions); APA, *Guidelines on Confidentiality*, 144 Am. J. Psychiatry at 1525.[20] Nor is this a case like *University of Pennsylvania v. EEOC*, *supra* (statements of reasons for employment decision not shielded in Title VII suit about discriminatory character of those reasons), where congressional override can be inferred from the fact that the statements at issue are part of the very substantive cause of action defined by Congress. *Compare* Pet. Br. 38.[21] This case is a garden-variety case involving a confidential treatment relationship and a litigant seeking access to the patient's therapeutic statements about events pre-dating the therapy, solely for the purpose of cross-examining the patient when she testifies in court about those events.

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[18] Exceptions, like the privilege itself, must be determined as a matter of federal common law under Rule 501. In other contexts involving federal common law, however, the Court has indicated that the content of the federal law in appropriate cases may be borrowed from the applicable state law if strong private reliance interests have been built on such state law (*United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-29 (1979))—an approach that, in the present context, would generally require federal courts to protect the confidentiality of the psychotherapist-patient relationship at least as much as the applicable state law, which presumptively determines the expectation of privacy shaping the relationship. *Cf. Gillock*, 445 U.S. at 368 n.8 (state privilege law relevant). Such an approach would also reduce forum-shopping concerns and the clinical difficulty that would be faced by therapists who had to keep up on and distinguish federal and state law in explaining the limits of privacy protection to their patients. In this case, of course, Illinois law strongly guarantees a privilege to respondent Redmond for her communications with her clinical-social-worker therapist. *See* Pet. App. 21a. And the Court need not decide here

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any general question about how important a particular State's privilege law should be in applying Rule 501 because the same result is reached by looking at state law generally or the law of Illinois in particular.

[19] A tort case brought by a patient based on a "recovered" memory of earlier abuse, where the patient sought damages for mental suffering, might fall into such an exception.

[20] This case does not involve nonconfidential communications, psychiatric examinations conducted under court order (whether for competency or commitment purposes), or contests over the validity of a former patient's will. *See* Howell & Ogles, *supra*, at 11; APA, *Guidelines on Confidentiality*, 144 Am. J. Psychiatry at 1525.

[21] A similar inference might be appropriate where substantive law imposes certain legal duties on a psychotherapist, like a duty to warn, triggered by information revealed in therapy. Such a legal duty might imply a right to make some inquiry (subject to proper privacy protections) into whether the duty-triggering information was in fact learned in therapy.

With no recognized exception to invoke, petitioner suggests a case-by-case balancing to be left in the discretion of the district court. Pet. Br. 31, 40-42. But any such approach would seriously damage the very values protected by the privilege: exceptions must remain well-defined and truly exceptional, or else the *assurance* of protected confidentiality, on which the patient's interests depend, would be lost, and adverse litigants could exploit the uncertainty of standards to make patients pay a prohibitive price for protecting their privacy by invoking the privilege. This Court made just this point with respect to the attorney-client privilege in *Upjohn Co. v. United States*, 449 U.S. at 393, stating: "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." The same principle applies to the psychotherapist-patient privilege at issue in this case.

There can be no categorical exception applicable to this case. Certainly, there is nothing weak about the interest in protecting confidentiality in this setting: post-trauma police counseling conducted in the shadow of litigation (*see* note 15, *supra*). On the other side of the equation, there is unlikely to be much true "need" for this evidence in cases of this kind: the events at issue, judged under an objective legal standard (*see Graham v. Connor*, 490 U.S. 386 (1989); Pet. App. 13a), occur in public and are complete before the therapy; other witnesses are often available (as numerous witnesses were in this case); the patient/officer is subject to deposition (here, 7 months after the events) and to cross-examination at trial; and there will often be police reports and other contemporaneous statements to use in testing the recollection of the patient/officer (*see* JA 140 (post-shooting interview of respondent Redmond at police station)). As the court of apepals noted, there is a powerful public interest in "encourag[ing] law enforcement officers who are frequently forced to experience traumatic events by the very nature of their work to seek qualified professional help" and the evidentiary need here was "cumulative at best." Pet. App. 22a, 23a.

Unless the privilege is to be destroyed, it cannot be enough to assert (Pet. Br. 22-23) a need to determine if the therapy produced an artificially "enhanced" memory. That "need" can be asserted in *any* case—just as it could always be claimed that the attorney-client privilege should be breached to determine whether the client's testimony was "enhanced" by discussions with the attorney hired to pursue, and to advise the client on how to pursue, a victory in legal proceedings. Yet, if the values served by the attorney-client privilege are sufficiently important to preclude such breach to explore that possibility, so are the values served by the psychotherapist-patient privilege. And, in any event, there is no *more* basis for petitioner's concern about pre-disposed suggestive enhancements of memory in the therapy context than for a comparable concern in the lawyer-client context. Indeed, it is widely regarded as unprofessional for a therapist to make efforts to induce false "memories" in the patient. *See, e.g.*, APA, *Statement on Memories of Sexual Abuse* at 4 (Dec. 12, 1993); Brown, *Pseudomemories: The Standard of Science and the Standard of Care in Trauma Treatment*, 37 Am. J. Clinical Hypnosis 1, 18 (1995) ("Above all, the therapist must avoid leading/misleading inquiry in pursuit of trauma.").[22] Thus, petitioner's speculation is implausible on its own terms and certainly cannot support abrogation of the psychotherapist-patient privilege.

Finally, there is no good reason to deny the privilege to respondent Redmond simply because the city-employed psychotherapist she saw was a licensed clinical social worker rather than a psychiatrist (or psychologist). It would be arbitrary to cut off some class of professionals who are licensed to perform the therapeutic functions for which the privilege is important. Today, as a practical matter, much therapy that would otherwise be performed by psychiatrists or psychologists is being performed by licensed clinical social workers. And no serious line-drawing problems arise if, as with defining who is covered by an "attorney"-client privilege, application of the privilege requires government licensure to engage in psychotherapy, whether as medical service or otherwise. The claim of privilege in this case therefore should be upheld.

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[22] Petitioner misreads (Pet. Br. 23) a passage from a very early work by Sigmund Freud, J. Breuer & S. Freud, *Studies on Hysteria* (1893), in 2 *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 279 (J. Strachey ed. 1955). The passage says nothing about the analyst's trying to implant specific *content* in a patient's mind, only that the analyst, when faced with a patient who declares that she has nothing to say, often must insist otherwise. *See id.* at 268, 270. For later discussions of later psychotherapeutic technique by Freud, see, *e.g.*, "On Psychotherapy" (1905), in 7 *id.* at 255-68; Lecture XXVIII, "Introductory Lectures on Psychoanalysis" (1916-1917), in 16 *id.* at 448-63; and "Analysis Terminable and Interminable" (1937), in 23 *id.* at 210-53. *See also* 23 *id.* at 248 ("we must not forget that the analytic relationship is based on a love of truth—that is, on a recognition of reality—and that it precludes any kind of sham or deceit").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr., Deceased,
Petitioner,
v.
MARYLU REDMOND, Hoffman Estates Police Officer,
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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IN THE
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CARRIE JAFFEE, as Special Administrator
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v.

MARYLU REDMOND, Hoffman Estates Police Officer,
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF *AMICUS CURIAE* OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The American Psychological Association (APA), a scientific and professional organization founded in 1892, is the major association of psychologists in the United States. It has more than 135,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.

The APA is filing this brief to give the Court the benefit of the first-hand experience of its members who provide psychotherapy services on a daily basis. Those members understand that confidentiality is an essential part of the process of psychotherapy. Maintaining the confidentiality of client communications is thus both an ethical duty and a practical necessity for this profession. Psychologists cannot effectively treat mental and emotional disorders if their clients fear that their innermost thoughts and feelings will not be kept confidential.

Amicus submits that this reality should weigh heavily in the Court's decision about whether to recognize a federal psychotherapist-patient privilege. Compelled testimonial disclosure, like any other breach of confidentiality, disrupts the psychotherapist-client relationship and can fatally impair the therapeutic process. Recognizing this intrusive effect, all fifty states have adopted some form of privilege for confidential communications to psychotherapists. They have concluded that the social benefits of the psychotherapist-patient privilege outweigh its limited costs to the justice system. This Court should weigh the same considerations and reach the same conclusion.

STATEMENT

Respondent Marylu Redmond is a police officer who shot and killed a man while in the line of duty. After the incident, Officer Redmond voluntarily sought counseling from a licensed clinical social worker. The victim's estate then sued Officer Redmond for wrongful death and deprivation of civil rights in federal court. Prior to and during the trial, petitioner sought to elicit testimony from Redmond and the social worker concerning what Redmond said about the circumstances of the shooting during her psychotherapy sessions. Redmond moved to quash this discovery, asserting the psychotherapist-patient privilege. The district court initially ordered disclosure of these communications, holding that a federal psychotherapist-patient privilege exists but that it does not apply to social workers. When Redmond and the social worker resisted the order, the court instructed the jury that it could infer that the information withheld would have supported petitioner's version of the events. The jury

found for petitioner and awarded a total of $545,000 in damages.

On appeal, the Seventh Circuit held (1) that there is a psychotherapist-patient privilege in federal court, and (2) that this privilege covers confidential communications made to social workers, including those at issue here. The court determined that it had the discretion to recognize such a privilege under Rule 501 of the Federal Rules of Evidence, which calls on federal courts to determine privilege issues by applying the "principles of the common law as they may be interpreted . . . in the light of reason and experience." Pet. App. 15-16. It then reasoned that

> recognition of a psychotherapist/patient privilege can only serve to encourage troubled individuals, as well as those who witness, participate in, and are intimately affected by acts of violence in today's stressful, crime ridden, homicidal environment, to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors.

Pet. App. 18. Citing this practical concern and the concomitant privacy interests of psychotherapeutic clients, the court of appeals decided to follow the lead of the fifty states, all of which have recognized some form of psychotherapist-patient privilege. Pet. App. 19-21. It held that the balance of competing interests favored the application of the privilege in this case and therefore shielded from disclosure the communications at issue. Pet. App. 22-23.

SUMMARY OF ARGUMENT

1. Federal Rule of Evidence 501 authorizes the federal courts to establish new evidentiary privileges not recognized at common law, based on "the principles of the common law as they may be interpreted . . . in the light of reason and experience." This rule, which calls on courts to apply the *principles* of the common law rather

than its specific existing rules, was intended by Congress to give the courts the flexibility to recognize new privileges.

2. The common law has long protected from disclosure confidential communications made within a relationship of trust. This principle, interpreted in the light of reason and experience, strongly supports the recognition of a psychotherapist-patient privilege in federal court.

Psychotherapeutic clients have strong expectations of confidentiality, and therapists have an ethical duty to maintain confidentiality. Confidentiality is essential to the psychotherapist-patient relationship because the effectiveness of psychotherapy depends on the client's willingness and ability to talk freely and candidly about his or her most intimate thoughts and feelings. The absence of confidentiality is likely to deter people from seeking therapy and to cause clients already in therapy to withhold information or to terminate the relationship prematurely.

The privilege benefits society as a whole because people who are mentally and emotionally healthy are more likely to be productive members of society and are less likely to pose a danger to the community. All fifty states have enacted some form of psychotherapist-patient privilege, concluding that this public benefit outweighs the interest in assuring that all evidence is available to assist in the administration of justice. There is no reason for the federal courts to strike the balance any differently.

3. If recognized, the privilege should not be applied on an *ad hoc*, case-by-case basis, for an unpredictable privilege is little better than no privilege at all. Rather, the privilege should be broad, and any exceptions to the privilege should be narrow, predictable, and categorical.

ARGUMENT

Congress, in Federal Rule of Evidence 501, expressly authorized the evolution of the federal common law of privileges, including the recognition of new types of privileges. Recognizing this fact, and given the importance of confidentiality to the effective treatment of mental and emotional disorders, the Seventh Circuit correctly decided to adopt and apply a psychotherapist-patient privilege in this case.

I. FEDERAL RULE OF EVIDENCE 501 AUTHORIZES THE FEDERAL COURTS TO RECOGNIZE A PSYCHOTHERAPIST-PATIENT PRIVILEGE.

There is no question that the federal courts have the *authority* to recognize a psychotherapist-patient privilege under Rule 501.[1] Although it is true that such a privilege did not exist "at common law," Congress never intended that the courts be restricted to the application of the privileges that existed at a particular point of common-law evolution. Rather, it intended to give the courts the flexibility to recognize new privileges and, indeed, specifically anticipated that the courts would use their best judgment about the psychotherapist-patient privilege issue.

Rule 501 provides, in relevant part, that in cases governed by federal law, "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This language, on its face, rebuts the notion that Congress simply wanted to incorporate the common law as it stood on a given date. The rule calls on courts to apply the *principles* of the common law (not just the existing "rules" or "privileges") as they *may be* interpreted (not as they "have been" or "were" interpreted) in the light of reason and experience. Thus, the intent of Congress in enacting this rule was "not to freeze the law of privilege" but to " 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis' . . . and to leave the door open to change." *Trammel v. United States*, 445 U.S. 40, 47 (1980) (quoting 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate)). *See In re Doe*, 964 F.2d 1325, 1327-28 (2d Cir. 1992); *In re Zuniga*, 714 F.2d 632, 637 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

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[1] We do not understand petitioner to be challenging the Seventh Circuit's authority to recognize the privilege. *See* Pet. Br. at 11 ("Federal courts have the authority under Rule 501 . . . to establish new evidentiary privileges 'in the light of reason and experience.' "); Pet. for Cert. at 7 (Rule 501 "permits the federal courts to look to 'reason and experience' in considering claims of privilege not recognized at common law"). Some courts, however, have seemingly taken this view. *See In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989) (with three Justices dissenting from denial of certiorari); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976).

This conclusion is reinforced by the sequence of events that led to the adoption of Rule 501. The Federal Rules of Evidence, as originally proposed by the Judicial Conference Advisory Committee and adopted by this Court, contained nine specific evidentiary privileges, including a psychotherapist-patient privilege in Proposed Rule 504. *See* Proposed Fed. R. Evid. 502-510, 56 F.R.D. 183, 234-56 (1973). These specific privileges were intended to be the sole privileges available in federal court except as otherwise required by the Constitution or acts of Congress. *See* Proposed Fed. R. Evid. 501, 56 F.R.D. at 230. But Congress declined to adopt the nine fixed privileges in the Proposed Rules, and opted instead for the general, more malleable mandate of Rule 501. It did so in order "to provide the courts with *greater* flexibility in developing rules of privilege on a case-by-case basis." *United States v. Gillock*, 445 U.S. 360, 367 (1980) (emphasis added).

The legislative history confirms that the move from specific privileges to the new Rule 501 should not be interpreted as barring, or even disfavoring, the recognition

of the protections for confidential communications to psychiatrists and psychologists that were provided in the proposed Rule 504:

> The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule[s] submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.[2]

S. Rep. No. 93-1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059.

To read Rule 501 as precluding judicial recognition of the psychotherapist-patient privilege solely because the privilege did not exist at common law would be particularly unwarranted in light of the actual evolution of the privilege under state law. Psychotherapy itself was relatively rare until after the Second World War. By that time, the majority of the states had already established a doctor-patient privilege by statute.[3] That privilege covered most of the therapeutic relationships then in existence, since they primarily involved physicians (*i.e.*, psychiatrists). Nevertheless, in the 1950s, the courts began to show an interest in recognizing a separate psychotherapist-patient privilege. *See* Proposed Fed. R. Evid. 504 advisory committee's note, 56 F.R.D. at 242 ("While the common law recognized no general physician-patient privilege, it had indicated a disposition to recognize a psychotherapist-patient privilege . . . when legislatures began moving into the field."); Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege,* 47 Nw. U.L. Rev. 384 (1952); *Binder v. Ruvell,* Civil Docket No. 52C2535, Circuit Ct., Cook Co., Ill., *reported in* 15 Am. Med. Ass'n. J. 1241 (1952) (refusing to allow the disclosure of a patient's communications during psychiatric treatment in a civil action despite the absence of a statutory privilege). *See also State v. Evans,* 454 P.2d 976 (Ariz. 1969) (holding that a criminal defendant's communications to a court-appointed psychiatrist were subject to a limited privilege despite the absence of an applicable statutory privilege).

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[2] Although privileges must be recognized on a case-by-case basis, they should not be applied on a case-by-case basis. *See* note 12, *infra*.

[3] *See* Zechariah Chafee, Jr., *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?* 52 Yale L.J. 607, 607 (1943) (New York passed the first physician-patient privilege in 1828 and all but seventeen states recognized a doctor-patient privilege in 1943).

By 1975, when Rule 501 was enacted, many states had separate psychotherapist-patient privilege statutes. *See* Proposed Fed. R. Evid. 504 advisory committee's note, 56 F.R.D. at 242 (citing examples).[4] At that time, there was general acceptance of the need for a privilege applicable to the psychotherapeutic relationship, even though the doctor-patient privilege as applied to other branches of medicine was under substantial attack. *See Taylor v. United States,* 222 F.2d 398, 401 (D.C. Cir. 1955); David W. Louisell & Kent Sinclair, Jr., *Foreword: Reflections on the Law of Privileged Communications—The Psychotherapist-Patient Privilege in Perspective,* 59 Cal. L. Rev. 30, 51-53 (1971); Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 Wayne L. Rev. 175, 184 (1960).

Recognizing the widespread support for the protection of the confidentiality of the psychotherapeutic relationship, the Advisory Committee included a psychotherapist-patient privilege among the nine specifically proposed privileges in the original version of the Federal Rules of Evidence approved by this Court, even though a more general physician-patient privilege was *not* included. *See* Proposed Fed. R. Evid. 504 advisory committee's note, 56 F.R.D. at 242; Proposed Fed. R. Evid. 504(a)(1), *id.* at 240 (covering communications to physicians only while they are engaged in "diagnosis or treatment of a mental or emotional condition"). Thus, by the time Rule 501 was enacted, the psychotherapist-patient privilege had already become a well-recognized and accepted feature of American law. It would be inappropriate to conclude that Rule 501, with its open-ended invitation to develop the common law in the light of "reason and experience," somehow precluded the federal courts from bringing federal practice into line with the rule then being applied in the majority of the states.

II. COMMON-LAW PRINCIPLES, APPLIED IN THE LIGHT OF REASON AND EXPERIENCE, STRONGLY SUPPORT RECOGNITION OF A PSYCHOTHERAPIST-PATIENT PRIVILEGE.

At common law, certain communications were protected from disclosure in order to encourage relationships that were considered extremely important to society and that required full and open communication among the participants. The "principles" applied at common law in making this determination have been distilled by Wigmore as follows:

(1) The communications must originate in a confidence that they will not be disclosed.

---

[4] In the 1970s, in some of those states where statutes had not yet been enacted, the courts recognized a psychotherapist-patient privilege on their own. *See Allred v. State,* 554 P.2d 411 (Alaska 1976); *In re "B",* 394 A.2d 419 (Pa. 1978) (recognizing a broad psychotherapist-patient privilege separate and apart from the state's statutory doctor-patient privilege).

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 John H. Wigmore, *Wigmore on Evidence* § 2285, at 527 (McNaughton rev. 1961) (emphasis omitted); *see Allred v. State*, 554 P.2d at 417 (referring to these principles in deciding to recognize a common-law psychotherapist-patient privilege). Applied in the light of reason and experience, these principles strongly support recognition of a psychotherapist-patient privilege in federal court.

A. Psychotherapeutic Clients Have a Strong Expectation of Confidentiality.

There is no doubt that communications made in the course of psychotherapy sessions are made with the expectation that they will be held in confidence. *See* John M. McGuire *et al.*, *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship*, 16 Prof. Psychol.: Res. & Prac. 375, 380 (1985) (survey results demonstrate that mental health "clients not only value confidentiality in the therapy relationship but that they also expect it"); David J. Miller & Mark H. Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 Prof. Psychol.: Res. & Prac. 15, 18 (1986) (noting that the majority of clients view confidentiality "as an all-encompassing, superordinate mandate for the profession of psychology"); Donald Schmid *et al.*, *Confidentiality in Psychiatry: A Study of the Patient's View*, 34 Hosp. & Community Psychiatry 353, 354 (1983) ("The patients in our sample clearly believed that confidentiality was an important concomitant of their care.").

Clients' expectations of confidentiality are based in part on psychologists' ethical duty to maintain confidentiality. *See* Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. Rev. 893, 920 (1982) (patients rely on psychotherapists' ethical duty to maintain confidentiality); *cf. Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793, 797 (N.D. Ohio 1965) (patients have a right to rely on physicians' ethical duty to maintain confidentiality). The APA ethical code dictates that psychologists "have a primary obligation and take reasonable precautions to respect the confidentiality rights of those with whom they work or consult." American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, § 5.02 (1992). In addition, psychologists are ethically bound to reveal to their clients the limitations on the confidentiality of their communications and the foreseeable uses of the information generated through their services at the outset of the relationship and as new circumstances may warrant. *See id.* § 5.01.

Clients' expectations of confidentiality are reinforced by the state laws throughout the country that provide a psychotherapist-patient privilege. *See* Anne D. Lamkin, *Should Psychotherapist-Patient Privilege Be Recognized?* 18 Am. J. Trial Advoc. 721, 723-25 (1995) (all fifty states and the District of Columbia have recognized the psychotherapist-patient privilege in some form). State laws that ensure the privacy of medical records, provide causes of action for wrongful disclosure of confidential information, or otherwise protect the privacy of the psychotherapist-client relationship further bolster clients' expectations of confidentiality. *See* Jill S. Talbot, Note, *The Conflict Between a Doctor's Duty to Warn a Patient's Sexual Partner That the Patient Has AIDS and a Doctor's Duty to Maintain Patient Confidentiality*, 45 Wash. & Lee L. Rev. 355, 360-61 (1988) (every state, to some extent, protects the confidentiality of medical records by statute, and in most jurisdictions, a patient may recover from a physician for wrongful disclosure of confidential information).

B. Confidentiality Is Essential to the Success of Psychotherapy.

It is equally true that "[t]he concept of confidentiality of client-therapist communications is at the core of the psychotherapeutic relationship." Ryan D. Jagim *et al.*, *Mental Health Professionals' Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure*, 9 Prof. Psychol. 458, 458-59 (1978). The establishment of a relationship of trust between client and therapist "has been deemed so essential by some that it has been argued that psychotherapy is rendered worthless in its absence." Mark B. DeKraai & Bruce D. Sales, *Privileged Communications of Psychologists*, 13 Prof. Psychol. 372, 372 (1982).[5]

The common law, of course, has long recognized that a promise of confidentiality is essential if clients are to be able to confide freely in their attorneys. This Court has also recognized "the imperative need for confidence and trust" in the physician-patient relationship, noting that "the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." *Trammel v. United States*, 445 U.S. at 51. The need for confidentiality is even greater in psychotherapy:

> "Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment."

Proposed Fed. R. Evid. 504 advisory committee's note, 56 F.R.D. at 242 (quoting Report No. 45, *Group for the Advancement of Psychiatry* 92 (1960)).

Unlike a patient with a broken leg who consults a physician, a client who seeks psychotherapy must expose his most intimate thoughts, feelings, and fantasies. Because "[t]he very essence of psychotherapy is confidential personal revelations about matters which the patient is and should be normally reluctant to discuss," it is vital that the psychotherapist be able to create an atmosphere in which clients can reveal sensitive and potentially embarrassing confidences without fear that they will be disclosed to others. Slovenko, *supra*, at 184-85. Indeed,

> "[t]he psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand."

Taylor v. United States, 222 F.2d at 401 (quoting Guttmacher and Weihofen, *Psychiatry and the Law* 272 (1952)).

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[5] *See also Allred v. State*, 554 P.2d at 417 ("Without the patient's confidence a psychiatrist's efforts are worthless.").

If clients do not perceive that the confidentiality of their communications will be adequately protected, the trust vital to the psychotherapeutic relationship is likely to be significantly impaired or destroyed. This conclusion is based on both the practical experience of APA members and empirical evidence. *See* Miller & Thelen, *supra*, at 18 (majority of subjects would react negatively (*i.e.* finding it difficult to talk to the therapist or discontinuing therapy) to being told before the first session that certain information was not confidential); Schmid *et al.*, *supra*, at 354 (sixty-seven percent of patients would be upset or angry if their confidences were revealed without permission); Paul S. Appelbaum *et al.*, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psychiatry & L. 109, 114 (1984) (fifty-seven percent of patients said therapists' revelation of information without their permission would adversely affect the therapeutic relationship).

Thus, studies show that when clients are told that their therapist might be required to disclose their communications in court, their willingness to discuss sensitive topics declines markedly. *See* Daniel W. Shuman *et al.*, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 Int'l J. of L. and Psychiatry 393, 407, 410, 416, 420 Table I (1986); Shuman & Weiner, *supra*, at 919-20, 926, 929 Appendix Table I; Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226, 1255 (1962) (seventy-one percent of people questioned by the author would be less likely to make full disclosure to a psychotherapist if the therapist had a legal obligation to disclose confidential information if asked to do so by a lawyer or judge). *See also* Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31 Stan. L. Rev. 165, 183 (1978) (majority of therapists surveyed by the author "thought that patients will withhold information important to treatment if they believe the therapist may breach confidentiality").[6]

Researchers have also found that fear of disclosure may cause some clients to terminate prematurely the psychotherapeutic relationship. *See id.* at 177 n.67 (one quarter of therapists surveyed reported that they had lost a client because he or she feared a breach of confidentiality); Miller & Thelen, *supra*, at 18; Shuman & Weiner, *supra*, at 926; Schmid *et al.*, *supra*, at 354 (seventeen percent of patients would leave treatment if verbal information were disclosed without their consent).

The threat of public disclosure may also deter persons with mental or emotional problems from seeking needed treatment in the first place. *See* Jacob J. Lindenthal & Claudewell S. Thomas, *Psychiatrists, the Public and Confidentiality*, 170 J. Nervous & Mental Disease 319, 321 (1982) (thirty-three percent of nonpatients in survey said that the possibility that a psychiatrist might divulge confidential information would deter them from seeking therapy; twenty-two percent of patients said they had held back from seeking psychotherapy because of a fear of disclosure); Louisell & Sinclair, *supra*, at 52. "Unlike the patient with physical ailments or complaints, who will likely consult a physician regardless of whether confidentiality is guaranteed, a neurotic or psychotic individual may seek help only if he is assured that his confidences will not be divulged, even in a courtroom." Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 504[03] at 504-18; *see also In re Doe*, 964 F.2d at 1328 (recognizing that communications from a patient to a psychotherapist typically involve more personal information than communications to other kinds of doctors); *Lora v. Board of Educ.*, 74 F.R.D. 565, 571 (E.D.N.Y. 1977) (same).

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[6] *See Allred v. State*, 554 P.2d at 417 ("Without foreknowledge that confidentiality will attach, the patient will be extremely reluctant to reveal to his therapist the details of his past life and his introspective thoughts and feelings.").

Petitioner cites a trilogy of studies for the proposition that the existence of a privilege has no effect on communications between clients and therapists. Pet. Br. at 28. The researchers who conducted these studies, however, in fact concluded that some form of psychotherapist-patient privilege *should be recognized. See* Shuman *et al., supra,* at 417-18. These studies do demonstrate that clients ordinarily assume that their communications with their psychotherapists will be held in confidence. *See* Appelbaum *et al., supra,* at 113-15; Thomas V. Merluzzi & Cheryl S. Brischetto, *Breach of Confidentiality and Perceived Trustworthiness of Counselors,* 30 J. of Counseling Psychol. 245, 250 (1983).[7] Therefore, it is not surprising that these studies found no effect when clients were told that a statutory privilege does in fact exist. Given the prevalent assumptions made by clients, the relevant inquiry is not whether knowledge of a privilege encourages communications but whether knowledge of its *absence* would deter or impede communications. *See Developments in the Law—Privileged Communications: Part II. Modes of Analysis: The Theories and Justifications of Privileged Communications,* 98 Harv. L. Rev. 1471, 1475 (1985) [hereinafter *Developments—Part II*]. Examining that question, the studies found that when clients were informed that their psychotherapist could be forced to disclose their communications in court, the degree of disclosure by clients about sensitive subjects dropped markedly.[8] *See* Shuman *et al., supra,* at 407, 410, 416, 420 Table I; Shuman & Weiner, *supra,* at 919-20, 926, 929 Appendix Table I. *See also* Kathryn M. Woods & J. Regis McNamara, *Confidentiality: Its Effect on Interviewee Behavior,* 11 Prof. Psychol. 714, 719 (1980) (interviewees who were told that their communications might not be strictly confidential were less open in their disclosures than those interviewees who were given either confidential instructions or no special expectations regarding confidentiality).

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[7] That clients often erroneously assume confidentiality in the absence of a statutory privilege does not render a privilege unnecessary. A pronouncement by this Court that there is no privilege in federal court would negate this assumption and alert clients and their therapists, who have an ethical duty to inform their clients of the limits of confidentiality, that their communications could be disclosed without their consent.

[8] The argument that the absence of a federal privilege will have little effect on the psychotherapeutic relationship because of the low probability that disclosure will be demanded by a federal court is refuted by these data; clients would have taken into account the probability that disclosure would be sought by a court when reporting that in the absence of a privilege, they would be less likely to communicate freely. *See Developments—Part II, supra,* at 1476.

C. Society Has a Strong Interest in Fostering the Psychotherapeutic Relationship and in Protecting Client Privacy.

There is likewise no dispute that the psychotherapist-patient relationship is "one that society considers worthy of being fostered." *In re Doe,* 711 F.2d 1187, 1193 (2d Cir. 1983). Countless people seek professional help to cope with daily stress, family turbulence, and severe emotional trauma, and research has shown that psychotherapy can be highly effective in addressing these problems. *See* Mary L. Smith *et al., The Benefits of Psychotherapy* 124 (1980) (the results of a comprehensive statistical analysis "of the research literature as a whole . . . show unequivocally that psychotherapy is effective"). It is surely in the interest of society as a whole to nurture the emotional health of its members, and mentally healthy people are more likely to be productive members of society. *See, e.g.,* Fla. Stat. ch. 490.002 (1993) ("The Legislature finds that as society becomes increasingly complex, emotional survival is equal in importance to physical survival.").

In addition to the benefit reaped by society from its members' emotional well-being, psychotherapy has other benefits. For those mentally ill people who have a potential to be dangerous, an effective psychotherapeutic relationship can play a key role in minimizing violent or self-destructive behavior. *See In re Zuniga*, 714 F.2d at 639; *In re Grand Jury Subpoena*, 710 F. Supp. 999, 1010 (D.N.J. 1989).

A final consideration, separate and apart from the societal interest in fostering the psychotherapeutic relationship, is the individual client's interest in keeping his intimate thoughts and feelings private. The damage resulting from compelled disclosure is more than the detrimental effect it may have on the therapeutic relationship; the invasion of privacy caused by forced breach of an entrusted confidence and the revelation of a client's confidential communications is a significant harm in and of itself. *See Developments—Part II*, *supra*, at 1481.

D. The Benefits of the Psychotherapist-Patient Privilege Outweigh Its Costs.

The important considerations underlying the adoption of a psychotherapist-patient privilege must, of course, be weighed against the interest in assuring that relevant evidence is available to assist in the fair and efficient disposition of legal claims. *See Trammel v. United States*, 445 U.S. at 51 (the standard used for determining whether to recognize a privilege is whether it "promotes sufficiently important interests to outweigh the need for probative evidence in the administration of . . . justice"). The balance strongly favors the recognition of the privilege.

This Court has previously "taken note of state privilege laws in determining whether to retain them in the federal system," *United States v. Gillock*, 445 U.S. at 368 n.8. In this case, all fifty states (and the District of Columbia) have adopted the psychotherapist-patient privilege in some form, concluding that the benefits of the privilege in protecting the psychotherapist-patient relationship far outweigh the limited costs to the administration of justice.

See Lamkin, *supra*, at 723-25.[9] There is no reason for the federal courts to strike the balance any differently.[10] Thus, in adopting Proposed Rule 504, the Judicial Conference Advisory Committee similarly concluded that the need to protect the confidentiality of the psychotherapist-patient relationship outweighed the need for relevant evidence in the administration of justice. *See* Proposed Fed. R. Evid. 504 advisory committee's note, 56 F.R.D. at 242 ("The conclusion is reached that Wigmore's four conditions needed to justify the existence of a privilege are amply satisfied."). In addition, the psychotherapist-patient privilege is advocated by many commentators. *See Developments in the Law—Privileged Communications: Part IV. Medical and Counseling Privileges*, 98 Harv. L. Rev. 1530, 1539 (1985) ("the psychotherapist-patient privilege has won consistent approval from courts and commentators").

The adverse effect on the search for truth would likely be minimal. Testimony about a prior communication is not the best evidence of the underlying facts asserted in that communication. *See Developments—Part II, supra*, at 1479. Communications to psychotherapists are especially suspect because they often represent the way the client subjectively experienced an event—his feelings and interpretations—rather than a detached and objective account of the event. *See* Robert M. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 Wayne L. Rev. 609, 631 (1964). Thus, the evidence to be gained by forced disclosure of such communications often will have little probative weight to offset the great prejudice inflicted upon the psychotherapist-patient relationship. *See id.*; Slovenko, *supra*, at 194 ("By and large, the data is of no value in the realism of the court.").

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[9] Although the statutes differ in their details, the vast majority of them apply to communications made to a psychotherapist, including a psychologist, for the purpose of diagnosis or treatment. *See* Lamkin, *supra*, at 723-25. The exceptions to the privilege allowed by the majority of the states, although not uniform, are generally narrow. *See id.* (twenty states follow proposed Rule 504, eleven states accord the privilege the same status as the attorney-client privilege, and ten states recognize the privilege subject to no or only minor limitations).

[10] Moreover, the absence of a federal privilege may interfere with the accomplishment of state policies. Despite the existence of a state privilege, it is likely that a psychotherapeutic client who learns that his communications may be disclosed in federal court will believe the confidentiality of his communications to be inadequately protected, and he may consequently withhold information or terminate the relationship. In such a case, the state policy of protecting the confidentiality of the psychotherapeutic relationship is undermined by the absence of a federal privilege. *See* pp. 14-15, *supra*.

In sum, although privileges generally "are not lightly created nor expansively construed, for they are in derogation of the search for truth," *United States v. Nixon*, 418 U.S. 683, 710 (1974), reason and experience dictate that the psychotherapist-patient privilege should be recognized under Rule 501. Reason indicates that the privilege is necessary to protect the confidentiality essential to the success of the psychotherapeutic relationship, a relationship of great value to society. *See Allred v. State*, 554 P.2d at 418. And the recognition of the privilege by all fifty states, the adoption of the privilege by the Judicial Conference Advisory Committee, and the support given the privilege by various commentators is evidence that "experience with it has been favorable." *In re Doe*, 964 F.2d at 1328.

III. APPLYING THE PSYCHOTHERAPIST-PATIENT PRIVILEGE USING A CASE-BY-CASE BALANCING APPROACH WOULD SUBSTANTIALLY UNDERMINE THE VALUE OF THE PRIVILEGE.

If the Court decides to recognize a psychotherapist-patient privilege, the next question will be how that privilege should be applied in this and other cases. The Court cannot, of course, establish all of the parameters of the privilege in a single common-law ruling. *See Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981). But it can establish the *approach* that courts should use.[11]

Petitioner seems to ask the Court to sanction a case-by-case *balancing* of interests, taking into account the importance of the legal claim, the centrality of the evidence at issue, and all of the other particular facts and circumstances of each case. *See* Pet. Br. at 40-42. Such an approach, however, would be inconsistent with the very policies that justify recognition of the privilege in the first place.[12] The purpose of the psychotherapist-patient privilege is to assure clients that they may reveal their most intimate thoughts and feelings without the fear of disclosure. That purpose will not be served if clients know that the confidentiality of their statements may be forfeited if and when some court, applying an *ad hoc* balancing test, decides that these communications should be revealed. As this Court has recognized, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. at 393.

This is not to say that a psychotherapist-patient privilege must be absolute. Rather, it means that any exceptions should be (1) limited, (2) clear and categorical, and (3) in most instances, triggered by the psychotherapeutic client's own conduct. Such exceptions are far preferable to *ad hoc*, case-by-case balancing because they allow clients to anticipate and/or control the extent of any forfeiture of confidentiality. *See id.* (if the purposes of a privilege are to be served, the communicators must be able to predict whether a particular communication will be protected).

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[11] One issue that will arise in this case is whether the privilege should extend beyond psychiatrists and psychologists to include licensed clinical social workers. While there may be some limits on the types of therapy or counseling warranting legal protection, *amicus* submits that the privilege should at least apply to all professionals licensed or certified by a given state to provide psychotherapy. That standard is met here.

[12] That Rule 501 was intended to "provide the courts with greater flexibility in *developing* rules of privilege on a case-by-case basis," *United States v. Gillock*, 445 U.S. at 367 (emphasis added), does not mean that the rules of privilege must be *applied* on a case-by-case basis. Thus, the courts do not determine the applicability of the attorney-client privilege on an *ad hoc* basis by weighing the need for the evidence in the particular case against the public benefit of protecting confidential communications to attorneys.

The state privilege laws provide some examples of categorical exceptions that are potentially defensible. Typically, they provide that the privilege will not apply where the client *himself* has either testified about the privileged communications or put his psychological condition at issue in litigation. *See, e.g., Bond v. District Court*, 682 P.2d 33 (Colo. 1984); *State v. Cole*, 295 N.W.2d 29, 35-36 (Iowa 1980). Often, the privilege is treated as waived where the client has revealed an immediate intent to harm third parties. *See, e.g.*, Alaska Stat. § 08.86.200(3) (1981 & Supp. 1992); Mass. Gen. Laws Ann. ch. 233 § 20B (Law. Co-op. Supp. 1995). A few states limit the application of the privilege in criminal proceedings involving violent crimes. *See, e.g.*, D.C. Code Ann. § 14-307(b)(1) (1989) (criminal proceedings involving death or physical injury); Ill. Compiled Stat. Ann. ch. 735, § 5/8-802 (Smith-Hurd 1993) (homicide). Other laws exempt commitment or child custody proceedings where a person's psychological condition is a necessary factor at issue. *See, e.g.*, Ill. Compiled Stat. Ann. ch. 740, § 110/10 (Smith-Hurd 1993); *Harbin v. Harbin*, 495 So. 2d 72 (Ala. Civ. App. 1986).

Every such exception will, to a greater or lesser extent, undermine the value of the privilege. A person going through a divorce, for example, might feel constrained to withhold some sensitive material from a therapist in anticipation of an upcoming custody battle. But the impact of such rules will be far less severe than a regime of general balancing, which would create uncertainty in every case.

Here, for example, it would make no sense to adopt petitioner's suggestion that the privilege should not apply because the testimony of the psychotherapist constituted "crucial evidence bearing on respondent Redmond's credibility," Pet. Br. at 21, or because important civil rights were at stake, *id.* at 38. The privilege would have little value if it could be abrogated whenever information from therapy sessions might have a significant impact on the outcome of the case. Moreover, it is hard to see any principled basis for erecting a hierarchy of importance of federal cases in order to limit the application of the privilege to less important matters.

CONCLUSION

The judgment of the Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator for
Ricky Allen, Sr., Deceased,
Petitioner,
v.

MARYLU REDMOND, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF *AMICI CURIAE* OF NATIONAL NETWORK TO END DOMESTIC VIOLENCE, FLORIDA COALITION AGAINST DOMESTIC VIOLENCE, ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, IOWA COALITION AGAINST DOMESTIC VIOLENCE, KANSAS COALITION AGAINST SEXUAL AND DOMESTIC VIOLENCE,

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In The

Supreme Court of the United States

October Term, 1995

No. 95-266

Carrie Jaffee, as Special Administrator for
Ricky Allen, Sr., Deceased,
Petitioner,
v.
Marylu Redmond, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF *AMICI CURIAE* OF NATIONAL NETWORK TO END DOMESTIC VIOLENCE, *ET AL.* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

Amici curiae National Network to End Domestic Violence, Florida Coalition Against Domestic Violence, Illinois Coalition Against Domestic Violence, Iowa Coalition Against Domestic Violence, Kansas Coalition Against Sexual and Domestic Violence, Maryland Network Against Domestic Violence, Minnesota Program Development, Inc., My Sisters' Place, National Organization for Men Against Sexism, Nebraska Domestic Violence and Sexual Assault Coalition, New Hampshire Coalition Against Domestic and Sexual Violence, New Jersey Coalition for Battered Women, New York City Coalition of Battered Women's Advocates, North Dakota Council on Abused Women's Services, NOW Legal Defense and Education Fund, Oklahoma Coalition Against Domestic Violence and Sexual Assault, Oregon Coalition Against Domestic Violence and Sexual Assault, Pennsylvania Coalition Against Domestic Violence, The Roswell Refuge for Battered Adults, SAFE Homes-Rape Crisis Coalition, Texas Council on Family Violence, and Wisconsin Coalition Against Domestic Violence submit this brief in support of Respondents.[1] The interest of *amici* are described in the Appendix to this brief.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Respondents' argument that Rule 501 of the Federal Rules of Evidence affords a privilege for psychotherapist-patient communications, and further argue that this privilege encompasses counselor-battered woman communications. For millions of women and children, violent physical abuse and mental and emotional trauma are part of everyday life. While Congress, state legislatures, and the courts are beginning to recognize this public disgrace and to intervene to deal with this crisis, counseling and shelter programs have since the mid-1970s provided the most effective and often the only services to victims of domestic violence. Equally important, these programs have been and continue to be primarily responsible for the physical safety of victims and their children.

At the heart of these programs is the counselor-battered woman relationship, which depends more on privacy and confidentiality than other therapeutic relationships because not only mental health but physical safety is at stake. The risk of violent assaults, including those resulting in death, increases when a battered woman contemplates leaving or leaves an abusive relationship. Thus, it is vital that information concerning her counseling, as well as the very fact that she is seeking counseling at all, be kept confidential from her abuser. Counseling and shelter programs, therefore, with the sanction of Congress and state legislatures, guard the confidentiality of information concerning the battered women using their services.

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[1] Consistent with S. Ct. R. 37.3, all parties have given *amici* their consent to the filing of this brief.

A rule of privilege, however, tied to labels and licenses often would exclude the counselors most able to help battered women, counselors who frequently advise from their shared experience as domestic violence victims. Unless the courts recognize a privilege that encompasses the confidentiality of counselor-battered woman communications, women may decline to utilize valuable domestic violence counseling services. Worse still, women who seek assistance risk experiencing an escalation of the abuse. Accordingly, "reason and experience" suggest that the Court recognize a counselor-battered woman privilege under Rule 501.

ARGUMENT

This case presents the question whether federal courts should recognize a psychotherapist-patient privilege under Rule 501 of the Federal Rules of Evidence,[2] and, if so, whether this privilege should be functionally defined by the presence of privacy and therapeutic considerations rather than by provider labels, licensure, or training. *Amici* join in Respondents' argument that Rule 501 encompasses the psychotherapist-patient privilege and further argue that the privilege includes the functional equivalent in the domestic violence context—the counselor-battered woman privilege.[3] The counselor-battered woman relationship has the same attributes justifying protection as the psychotherapist-patient relationship: Battered women confide in counselors[4] to recover their mental and emotional well-being.

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[2] Fed. R. Evid. 501 states in relevant part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

[3] See *Trammel v. United States*, 445 U.S. 40, 47 (1980) (noting that Rule 501 "manifested an affirmative intention not to freeze

The case for a privilege protecting the counselor-battered woman relationship is particularly compelling because the relationship is founded on not only therapeutic confidence and privacy, but the physical safety of the victim and often the children who accompany her to a shelter. Communications between a counselor and a battered woman include counseling to ensure the physical safety of the battered woman whose life and whose children's lives are in immediate and continuous risk from her abuser. Revealing any communications between a battered woman and her counselor may increase the risk and level of physical violence. Furthermore, while many battered women seek domestic violence counselors for their specialized expertise, many others must rely upon counselors because their access to more formal psychotherapy is blocked by their abusers' control of family financial resources,[5] including insurance benefits. It would be patently unfair to deny battered women a privilege solely because of financial desperation. Thus, a

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the law of privilege" but instead to " 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis' " (citations omitted)); see also 23 Charles A. Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5422, at 691 (1980) [hereinafter "Wright & Graham"] ("the enactment of Rule 501 was not intended to freeze the present law of privilege").

[4] The term "counselor" as used in this brief means an individual engaged in a domestic violence program, the primary purpose of which is to render counseling to victims of domestic violence. A counselor can serve many roles, including, but not limited to, counseling, advising, answering crisis hotlines, advocating on behalf of a battered woman with law enforcement officials, and providing information and referrals.

[5] See Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 Fordham Urb. L. J. 1141, 1150-51 (1995).

counselor-battered woman privilege is at once similar to and more compelling than the psychotherapist-patient privilege. "Reason and experience" therefore warrant a functionally defined psychotherapist-patient privilege sufficient to protect the counselor-battered woman relationship.

I. DOMESTIC VIOLENCE DEVASTATES MILLIONS OF LIVES.

Estimates of the number of women severely assaulted each year by their partners range from two million to as high as four million.[6] In proclaiming October 1995 "National Domestic Violence Awareness Month," President Clinton noted that in 1992, nearly thirty percent of all female homicide victims were killed by husbands, former husbands, or boyfriends.[7] Battering has been cited as the most frequent reason why women are treated in emergency rooms,[8] and it is one of the leading causes of injury to women of ages fifteen to forty-four—more common than automobile accidents, muggings, and cancer deaths combined.[9] The total cost of domestic violence to the

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[6] See H.R. Rep. No. 103-711, 103d Cong., 2d Sess. 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 1839, 1851-52 (finding by Congress that four million women are battered by their partners each year); *Women and Violence: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 117 (1990) (testimony of Angela Browne, Ph.D.) (noting that two million is a conservative estimate and that most experts would agree that four million women is a more accurate estimate); see also *id.* at 79 (1990) (noting from statistics that if every woman victimized by domsetic violence in a given year were to join hands, the line would extend from New York to Los Angeles and back again); Antonia C. Novello, *From the Surgeon General, U.S. Public Health Service, A Medical Response to Domestic Violence*, 267 JAMA 3132, 3132 (1992).

[7] Proclamation No. 6829, 60 Fed. Reg. 51,879 (1995) (citing Department of Justice statistics).

[8] See Novello, *supra*, note 6, at 3132.

[9] *Violence Against Women: A Week in the Life of America*, a Majority Staff Report, Senate Comm. on the Judiciary, 102d

American economy may be between $5 and $10 billion per year.[10]

On a personal level, domestic violence devastates the lives of its victims. Fatalities aside, physical injuries such as shattered bones, scratches, bruises, and burns are only the more visible consequences. The emotional and mental harm can be equally severe: Battered women fear for their safety, expect violence to recur, lose their self-esteem, feel out-of-control and trapped, develop an increased tolerance for violence and abuse, and lose faith in others.[11] They commonly feel a sense of terror, depression, grief, anger, rage, hatred, and shame. Battered women also are known to develop nightmares, sexual dysfunctions, concentration problems, and addictions.[12] Domestic violence is abuse of the mind and spirit as well as the body.

The children of battered women also suffer enormously. They are traumatized just by witnessing the abuse of their mothers.[13] As noted by Chief Justice Workman of the West Virginia Supreme Court:

Cong., 2d Sess. 3 (1992). See also *Developments in the Law—Legal Responses To Domestic Violence*, 106 Harv. L. Rev. 1498, 1501 (1993) [hereinafter "Responses to Domestic Violence"] (noting Suregon General's report that abuse inflicted by intimates constitutes one of the leading causes of injury to women in the United States).

[10] Harris Meyer, *The Billion-Dollar Epidemic*, Am. Med. News, Jan. 6, 1992, at 7 (including costs attributed to health care, investigative and protective services, the criminal justice system (including police forces), and lost worker productivity).

[11] Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1218-19 (1993) (citations omitted).

[12] *Id.* at 1221-22.

[13] *Id.* at 1211 (citing Peter G. Jaffee, *et al.*, *Children of Battered Women* (1990)). Nearly three million children witness their mothers being physically battered each year. Alan J. Tomkins, *et al.*, *The Plight of Children who Witness Woman Batter-*

> Children learn several lessons in witnessing the abuse of one of their parents. First, they learn that such behavior appears to be approved by their most important role models and that the violence toward a loved one is acceptable. Children also fail to grasp the full range of negative consequences for the violent behavior and observe, instead, the short term reinforcements, namely compliance by the victim. Thus, they learn the use of coercive power and violence as a way to influence loved ones without being exposed to other more constructive alternatives. In addition to the effect of the destructive modeling, children who grow up in violent homes experience damaging psychological effects.[14]

Furthermore, these children may suffer incidental injury simply from being present during assaults on their mothers, or they may be targets of abuse themselves.[15] In addition, there is an intergenerational aspect to domestic violence. It is well established that a male who witnesses family violence as a child will be predisposed to committing family violence as an adult.[16]

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ing: Psychological Knowledge and Policy Implications, 18 Law & Psychol. Rev. 137 (Spring 1994) (citing numerous sources).

[14] *Patricia Ann. S. v. James Daniel S.*, 435 S.E.2d 6, 18 (W. Va. 1993) (Workman, C.J., dissenting) (citing Laura Crites & Donna Coker, *What Therapists See That Judges May Miss*, The Judges' Journal 11-12 (Spring 1988)).

[15] See Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 Family L. Q. 357, 357 (Summer 1995) (noting "strong substantive correlation" between adult partner abuse and child abuse).

[16] Dutton, *supra* note 11, at 1211-12 (citing Gerald T. Hotaling & David B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, 1 Violence & Victims 101 (1986)).

II. CONGRESS AND STATE LEGISLATURES HAVE ARTICULATED A STRONG PUBLIC POLICY IN FAVOR OF INTERVENTION AGAINST DOMESTIC VIOLENCE AND PROVISION OF CONFIDENTIAL SERVICES TO VICTIMS OF DOMESTIC VIOLENCE.

In recognition of this violence and suffering, Congress and state legislatures have enacted legislation to aid the victims of domestic violence and to strengthen enforcement of the law against perpetrators of domestic violence. Congress enacted the Family Violence Prevention and Services Act [17] and the Victims of Crime Act [18] to provide funds to assist battered women and other victims of domestic violence. These Acts earmark funds "for the purpose of providing immediate shelter and related assistance to victims of family violence." [19] The funds are desperately needed because the demand for shelters far exceeds their capacity. In Philadelphia, one shelter rejects seventy-five percent of the women who seek shelter. Another shelter in New York City turns away one hundred battered women and their children every week. In Massachusetts, women's shelters turn away seventy-one percent of the women seeking shelter and eighty percent of the children.[20] The recently enacted Violence Against Women Act ("VAWA")[21] similarly provides grants for shelters

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[17] 42 U.S.C. §§ 10401, *et seq.* (1995).

[18] 42 U.S.C. §§ 10601, *et seq.* (1995).

[19] 42 U.S.C. § 10402(f) (1995).

[20] Ann Jones, *Next Time, She'll Be Dead: Battering & How to Stop It* 229-30 (1994). As of 1994, there were 1,842 domestic violence programs in the United States, including 1,268 shelter programs. National Coalition Against Domestic Violence (1995) (calculated by Stacy Plichta and J.M. Lee, Mt. Sinai School of Medicine).

[21] Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-703, 108 Stat. 1796, 1902-55 (1994) (codified in scattered sections of 42 U.S.C.).

and related assistance [22] and funds a national domestic violence hotline to facilitate access to information and assistance for battered women.[23] VAWA also created criminal penalties for incidents of interstate domestic violence, including stiff jail terms.[24]

State legislatures have also responded to the domestic violence crisis. For example, all fifty states and the District of Columbia have enacted civil protection order statutes that afford broad relief to adult and child victims of domestic violence.[25] The relief enumerated in state codes includes injunctions against future violence, exclusion from the family domicile, support, custody, relinquishment of weapons, and payment of losses and attorneys fees. Many states now require police departments to respond to domestic violence incidents in the same manner as they would respond to offenses involving strangers.[26] States likewise have passed mandatory arrest statutes that require a police officer to arrest an abuser if there is probable cause to believe that an assault has occurred or that a protective order has been violated.[27] More recently, forty-nine states and the District of Columbia have enacted anti-"stalking" laws, criminalizing harassment that threatens death or serious injury.[28]

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[22] See, *e.g.*, *id.* § 40121 (combat violent crimes against women); § 40151 (reduce sexual assaults against women); § 40231 (encourage arrest policies); § 40241 (battered women's shelters); § 40602 (stalking data gathering).

[23] See, *e.g.*, *id.* § 40211.

[24] See, *e.g.*, *id.* § 40221.

[25] See, *e.g.*, Ala. Code § 30-5-1, *et seq.* (1995); Alaska Stat. § 25.35.010, *et seq.* (1995); Ariz. Rev. Stat. Ann. §§ 13-3601 to 02 (West 1995); Ark. Stat. Ann. § 9-15-101, *et seq.* (1995); Colo. Rev. Stat. § 14-4-101, *et seq.* (1995).

[26] See, *e.g.*, Mo. Rev. Stat. § 455.080 (1995). Of course, implicit in this requirement is the unfortunate fact that in the absence of legislation, many police officers regard domestic violence as less serious than other violent crimes—even though the statistics show that women are far more likely to be assaulted or killed by their partners than by strangers. See *Responses To Domestic Violence*, *supra* note 9, at 1501 (noting that as many as forty percent of calls to police involve domestic disturbances).

In addition, many states have now adopted custody codes requiring courts in custody deliberations to consider evidence of domestic violence against the perpetrator.[29] Some states have embraced presumptions against any award of custody to perpetrators of domestic violence.[30] State legislatures thus have recognized that domestic violence jeopardizes the well-being of children who witness the abuse and have mandated counseling for perpetrators as a condition precedent to custodial access.

Both federal and state legislatures also have recognized the importance of protecting the privacy of battered women and the confidentiality of their dealings with support services. The Family Violence Prevention and Services Act, for example, forbids grants to any program without "documentation that procedures have been developed . . . to assure the confidentiality of records pertaining to any individual provided family violence prevention

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[27] See, *e.g.*, Conn. Gen. Stat. Ann. § 46b-38b (West 1994); D.C. Code Ann. § 16-1031 (1994); Kan. Stat. Ann. § 22-2307 (1994); Nev. Rev. Stat. § 171.1225 (1993); N.J. Stat. Ann. § 2C:25-21 (West 1995); Or. Rev. Stat. § 133.055(2)(a) (1993).

[28] See, *e.g.*, Ky. Rev. Stat. Ann. § 508.140 (Baldwin 1995); Okla. Stat. Ann. tit. 21, § 1173 (West 1995); Tenn. Code Ann. § 39-17-315 (1995).

[29] See, *e.g.*, Colo. Rev. Stat. Ann. § 14-10-124 (West 1995); Fla. Stat. Ann. § 61.13 (West 1995); Minn. Stat. Ann. § 518.17 (West 1995); N.J. Stat. Ann. § 9:204 (West 1995).

[30] See, *e.g.*, Idaho Code § 32-717B (1995); N.D. Cent. Code § 14-09-06.2 (1993); Okla. Stat. Ann. tit. 10, § 21.1 (West 1995); Wis. Stat. Ann. § 767.24 (West 1995).

or treatment services." [31] Additionally, VAWA requires the United States Postal Service to implement new regulations "to secure the confidentiality of domestic violence shelters and abused persons' addresses." [32] Because many shelters and counseling programs receive federal funding, they must resist all attempts to divulge confidential information about the battered women they serve.

Similarly, state legislatures have acted specifically to protect the confidentiality of battered women by restricting access to information that would reveal their locations. For example, some states require, or at least allow, courts to keep addresses of battered women confidential.[33] Others permit victims to remove their driver's license and registration information from the public record.[34] Colorado allows a battered woman to make any public record confidential if she submits an affidavit stating that she believes she will be harassed or threatened with bodily harm.[35] New Jersey and Washington enable a battered woman to register to vote without disclosing her street address.[36]

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[31] 42 U.S.C. § 10402(a)(2)(E) (1995). The Victims of Crime Act contains a similar provision. 42 U.S.C. § 10604(a) (1995).

[32] 42 U.S.C. § 13951 (1995).

[33] See, *e.g.*, Mass. Gen. L. ch. 209A, § 8 (1995); N.J. Rev. Stat. Ann. § 2C:25-26 (West 1995); Tex. Fam. Code Ann. § 71.111 (West 1995); Wis. Stat. Ann. §§ 813.125, 895.67 (West 1995).

[34] See, *e.g.*, Ark. Code Ann. §§ 27-50-906 to -908 (Michie 1994); Cal. Veh. Code § 1808.21 (West 1995); Minn. Stat. Ann. § 171.12 (1986 & Supp. 1995).

[35] Colo. Rev. Stat. Ann. § 24-72-204 (West 1995).

[36] N.J. Rev. Stat. Ann. §§ 2C:25-26, 19:31-3.2 (West 1995); Wash. Rev. Code §§ 40.24.060-.24.070 (1995). The New Jersey legislature enacted its statute after a court held that a battered woman could register to vote without disclosing her street address. See *D.C. v. Superintendent of Elections*, 618 A.2d 931, 932 (N.J. Super. Ct. 1992).

The State of Washington manages the most sweeping confidentiality system, effectively assisting battered women to disappear.[37] The Address Confidentiality Program permits a battered woman to list a post office box supplied by the Secretary of State's office as her address. State employees then forward mail to her real home. The program also allows a battered woman to seal her records to thwart her abuser's efforts to locate her. Shelters, which coordinate with the state, actually relocate the battered women. During its four years of operation, the program has served approximately 600 clients.[38]

In 1982, in an effort to protect further the confidentiality of battered women, the President's Task Force on Victims of Crime recommended that legislation be enacted "to ensure that designated victim counseling is legally privileged and not subject to defense discovery or subpoena." [39] The recommendation specifically addressed the need to enact a privilege that would cover social workers, nurses, and victims counselors, not just psychiatrists and psychologists who serve wealthier clients.

Many states responded by enacting statutory privileges to guard the confidentiality of the communications between a counselor and a crime victim. At least one-fifth of the states have enacted a counselor-battered woman privilege.[40] Other states have passed more general

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[37] See Wash. Rev. Code Ann. §§ 40.24.010-.24.900 (West 1995); Wash. Admin. Code § 434-840 (West 1994); Julie McDonald, *Concealed Identity*, Daily News (Longview, Wash.), June 18, 1991, at A1.

[38] See Nancy Cleeland, *One State Helps Women Get Away*, San Diego Union-Trib., July 10, 1994, at A22.

[39] President's Task Force on Victims of Crime, Final Report 17, 22 (1982).

[40] See, *e.g.*, Cal. Evid. Code §§ 1037.1-37.7 (West 1995); Conn. Gen. Stat. § 52-146(k) (West 1994); Ill. Ann. Stat. ch. 110, para. 8-802.2 (Smith-Hurd 1995); La. Rev. Stat. Ann. § 46:2124.1 (West

counselor-victim privileges.[41] Because of the increasing concern about domestic violence, the enactment of more state privilege statutes is likely to occur. Failure to recognize a counselor-battered woman privilege thus would subvert the efforts of state legislatures and Congress to protect battered women's safety.

III. COUNSELING AND SHELTER PROGRAMS, OFTEN OPERATED BY FORMER VICTIMS OF DOMESTIC VIOLENCE, ARE THE MOST EFFECTIVE MEANS FOR PROTECTING AND AIDING BATTERED WOMEN AND FOR SUBSTANTIALLY REDUCING THE INCIDENCE OF DOMESTIC VIOLENCE.

As the statistics demonstrate, and as Congress and state legislatures have properly recognized, domestic violence is a national tragedy and its victims are in critical need of outside assistance to deal with the effects of abuse. Domestic violence programs are considered the most effective means for recovering physical and mental health because they "offer a combination of services that cannot be found in any other type of helping organization." [42] Shelter and counseling services are "havens where [a battered woman] can recuperate from her wounds, recover her sense of self, and re-evaluate her situation." [43] It is therefore not surprising that Congress in VAWA appropriated at least $182 million for fiscal years 1996 through

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1994); Mass. Gen. Laws Ann. ch. 233, § 20j (1995); Mich. Comp. Laws § 600.2157a (1995); N.D. Cent. Code § 14-07.1-18 (1993); 42 Pa. Cons. Stat. Ann. § 5945.1 (Supp. 1991); see also Wyo. Stat. §§ 1-12-116, 14-3-210 (1977).

[41] See, *e.g.*, Ala. Code §§ 15-23-40 to -45 (1990); Ind. Code Ann. §§ 35-37-6-1 to -11 (Burns 1995); Iowa Code Ann. § 236A.1 (1994); N.J. Stat. Ann. §§ 2A:84A-22.14 to -22.15, :84A-29 (West 1995); N.M. Stat. Ann. §§ 31-25-1 to -6 (Michie 1995).

[42] Lee H. Bowker, *Ending the Violence* 86 (1986).

[43] Del Martin, *Battered Wives* 197 (1976).

2000 to support battered women's shelters, where women can recuperate and receive counseling.[44]

Counseling and shelter programs furnish a variety of services, including hotlines, individual and group counseling, housing, advocacy services, physical protection, emergency medical care, food, clothing, transportation, childcare, and outreach and education programs. The counseling function is an integral part of these programs in two ways. First, by encouraging battered women to confide in them, counselors are best able to evaluate the particular risks posed by perpetrators and to help identify the services and legal interventions that will enable the victims to escape the abuse. Second, a counselor can provide psychological counseling appropriate to feelings of despair, depression, fear, and shame, which will enable the patient to regain self-confidence and leave the abusive relationship.

Counselors are very often former victims of domestic violence themselves who have succeeded in escaping such relationships. They are particularly qualified to assure the battered woman that her situation is not unique. Counselors inform battered women that women of all ages, socio-economic classes, religions, races, and cultures are battered by the men who profess to love them. Such information may profoundly change the abused woman's understanding of her experience, permitting her to reject the excuses the batterer advances as justification for his maltreatment. Domestic violence services thus may provide critical counseling that helps the battered woman affirm her integrity and reclaim her ability to resist the violence and to act effectively to protect herself and her children. Counselors function like psychotherapists, while also offering shared experience to reduce isolation and rebuild the self-esteem of battered women. Their counseling additionally supplies the critical components of strategic planning with victims for physical safety and access to legal resources.

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[44] See 42 U.S.C. §§ 10409(a)-(b); §§ 10402(a), (f).

Given the nature of their qualifications, counselors often do not have formal credentials. Though counselors may be psychiatrists or psychotherapists, many are social workers, clergy, attorneys, or volunteers with significant life experience.[45] The last category includes the survivors of abuse who have chosen to help other battered women.

The psychotherapist-patient privilege should be defined functionally to meet the needs of confidentiality and privacy that justify protection. In determining a privilege, courts should focus on the substance of the counseling relationship rather than the identity or credentials of the counselor. The privilege should protect the life-preserving and therapeutic function of the relationship not only when counseling is performed by credentialed individuals, but, more importantly, also when performed by counselors in an organizational environment that is recognized as safeguarding important public policy and social interests. To focus on labels would be to sacrifice substance to form.

Indeed, recognizing substance over labels in the counselor-battered woman relationship is especially compelling because this relationship typically involves more sensitive and embarrassing personal disclosures than those considered in other privileged relationships.[46] To focus on labels rather than substance in this context would result in conditioning the privilege on the victim's ability to pay a formally licensed psychotherapist. The counselor is often the poor person's psychotherapist.[47]

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[45] See Catherine M. Baytion, *Toward Uniform Application of a Federal Psychotherapist-Patient Privilege*, 70 Wash. L. Rev. 153, 153 (1995) ("Social workers; psychiatric nurses; counselors of rape victims, battered women, and drug and alcohol abusers; as well as school guidance counselors and marital and family counselors arguably perform the same functions as psychotherapists."); Catharina J.H. Dubbelday, *The Psychotherapist-Client Testimonial Privilege: Defining The Professional Involved*, 34 Emory L. J. 777, 821 (1985) ("[A]n approach that focuses only on the credentials of a professional seems arbitrary.").

[46] *Cf. In Re Pittsburgh Action Against Rape*, 428 A.2d 126, 146 (Pa. 1981) (Larsen, J., dissenting).

> [M]any domestic violence victims are economically dependent on the men who abuse them[;] few victims have the resources necessary to begin a new life for themselves and their children. Batterers commonly isolate battered women from financial resources. For example, many battered women do not have ready access to cash, checking accounts, or charge accounts. One study showed that 27% of battered women had no access to cash, 34% had no access to a checking account, 51% had no access to charge accounts, and 22% had no access to a car.[48]

Recognizing a privilege for the psychotherapist and not the counselor who performs the same function would be to draw an arbitrary socio-economic distinction.[49]

IV. THE CRITICAL FUNCTION TO BE PROTECTED IS A RELATIONSHIP IN WHICH CONFIDENTIALITY AND PRIVACY ARE EXPECTED BY THE BATTERED WOMAN AND REQUIRED FOR SUCCESSFUL COUNSELING.

Confidentiality is the cornerstone of all successful counseling and shelter programs. Without confidentiality, few battered women would seek help for fear that their abusers would learn of their disclosures and retaliate against them. Without assurances of confidentiality, few battered women would divulge their private thoughts and feelings, even though such disclosures are necessary to make recovery possible. For these reasons, counselors assure each battered woman that her dealings with these programs, including her communications, will be kept strictly confidential.

A. Confidentiality Is Essential To Guarantee the Safety of Battered Women.

The physical danger faced by battered women underscores the necessity for confidentiality in the relationships they have with counselors. By seeking help, battered women often expose themselves to grievous harm:

> Most victims of domestic violence have been threatened with further assault or even death if they ever reveal what their abusers have done to them. Almost all battered women are terrified of these threats. . . . Without assurances of confidentiality, few battered women would contact domestic violence programs or open up to battered women's counselors.[50]

Battered women have reason to believe the threats of their batterers: The risk of violent assaults on battered women increases when a woman makes an effort to leave or after she has left.[51] Not only does non-fatal violence

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[47] See Wright & Graham, *supra* note 3, § 5429, at 819 (noting that the number of social workers exceeds the combined number of psychiatrists, physicians and psychologists in low income areas).

[48] See Davis, *et al.*, *supra* note 5, at 1150.

[49] Failing to recognize the privilege would also discriminate against women who wish to benefit from the specialized expertise of a domestic violence counselor, even if they could afford a psychotherapist.

[50] Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 Fam. L. Q. 273, 295 (Summer 1995).

[51] See *id.* at 294 (citing Lenore E. Walker, *The Battered Woman Syndrome* 25-26 (1984)); Dutton, *supra* note 11, at 1212; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 5-6 (1991); see also Bureau of Justice Statistics, *Criminal Victimization in the United States, 1990*, U.S. Dep't of Justice, February 1992 (divorced or separated persons had the highest rate of violent crimes committed by relatives); Mary P. Koss, *et al.*, *No Safe Haven: Male Violence Against Women at Home, at Work, and in the Community* 98-99 (1994); J.M. Lawrence, *Fleeing Abuse Is Often Deadly For Women*," Boston Herald, Oct. 15, 1995, at 26.

escalate,[52] but deadly violence increases as well. Women are most likely to be murdered when attempting to report abuse or to leave an abusive relationship.[53] Thus, confidentiality is not just a convenience to battered women—it is a necessity.[54]

Since the inception of domestic violence counseling and shelter services in the mid-1970s, domestic violence programs have embraced the ethical principle of confidential communications between victims and counselors. This principle has been vigorously and effectively pursued by domestic violence programs in policy, practice, legislation, and litigation. Domestic violence programs take every precaution to ensure the confidentiality necessary to protect battered women from their abusers.[55] Domestic violence programs rarely publish the addresses of shelters and safe home services, nor do they reveal the whereabouts of battered women once they leave home. All programs maintain confidentiality policies. Most involve training their counselors to refuse to disclose any information about a battered woman without her consent.[56] Moreover,

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[52] See David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 13 Repsonse 13, 13 (1990).

[53] See Dutton, *supra* note 11, at 1212; Lan Nguyen, *Police Say Man Stalked Wife Before Killing*, Wash. Post, Dec. 28, 1995, at B1 (describing battered woman murdered by husband one day after arrested and released for stalking and five months after separation).

[54] Fearing future retaliation and violence, battered women often make great efforts to preserve the confidentiality of their location once they leave the batterer. See Zorza, *supra* note 50, at 280 (quoting Catherine Kirkwood, *Leaving Abusive Partners: From the Scars of Survival to the Wisdom for Change* 103 (1993) (describing efforts, such as paying utility bills under aliases, to remove "any indication of existence")).

[55] Susan H. Rauch, *Protecting Confidentiality of Victim-Counselor Communications* 47 (1993).

[56] See, *e.g.*, Statement of Confidentiality for My Sister's Place, Washington, D.C. (providing that service volunteers "will never

in an era where the privacy of telephone communications has become complicated and costly, domestic violence programs across the country have taken leadership roles in public policy dialogue and litigation to assure that telephone privacy and safety is accessible to all telephone users. Shelters and counseling programs have tailored telephone practices to prevent disclosure of counseling relationships and the communications therein. The uniform application of confidentiality policies among shelters and the seriousness with which those policies are administered consequently have led to a culture of privacy and nondisclosure.

Unless privileged, all of the communications concerning safety precautions can be compromised through court processes. Abusers could use the legal system to extract confidential information, such as the details of battered women's escape plans, completely compromising the safety of battered women and their children and also the safety of those persons and organizations enlisted to assist them. Disclosure of the extent of the fear, despair, and trauma resulting from the abuse would also confirm for perpetrators that violence has been highly effective. Disclosure thus may encourage escalated coercion and violence to maintain control over a battered woman or to impede a battered woman's departure from the relationship. Similarly, revealing discussions pertaining to relocation simplifies the efforts of abusers to locate and further abuse battered women. Even acknowledging the existence of a woman's communications with shelters or other support organizations may infuriate an abuser, heightening the danger of assault before and after escape.

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reveal the location of the shelter to anyone" and that any information relating to clients "is confidential and not to be shared or repeated to anyone"); Model Pennsylvania Confidentiality Policy (providing that the women's center and its employees will "hold confidential all communications, observations and information made by, between, or about clients") (cited Rauch, *supra* note 55, at Appendix V).

B. Confidentiality Is Essential to Promote the Counseling Needs of Battered Women.

While confidentiality is vital to protect the safety of battered women, it is also an integral component to successful therapeutic counseling. A battered woman must confide in her counselor, revealing private and embarrassing information.[57] Often, she feels isolated by her abuser and forgotten, ignored, or stigmatized by society. Many battered women feel humiliated by their situation, including their inability to stop the violence of their abusers.[58] The private and sensitive nature of the information involved in this counseling leads the battered woman implicitly to expect confidentiality, and this is usually confirmed by express promises by shelter personnel of confidentiality. Few battered women would broach these most private subjects without express assurances of confidentiality. Thus, without a guarantee that her communications will be kept confidential, a battered woman who needs counseling may be afraid to seek assistance at all.[59]

Moreover, even if she pursues counseling, any risk of disclosure necessarily inhibits a battered woman from freely revealing all of her fears, feelings, and anxieties, thereby limiting the effectiveness of the counseling.[60]

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[57] *Cf. Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955).

[58] Zorza, *supra* note 50, at 295; see also Roberta L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 Fam. L. Q. 187, 187-88 (Summer 1995) ("[V]ictims are not always comfortable admitting to the violence in their homes. They have good reason to be mistrustful because our society has not yet shown it is willing to offer consistent support to victims of domestic violence.").

[59] See Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 188-89 (1960).

[60] *Cf. In re Pittsburgh Action Against Rape*, 428 A.2d 126, 146-47 & n.2 (Pa. 1981) (Larsen, J., dissenting) (rape victims asked that their records be destroyed and anonymous telephone calls increased after publicity from case called into question rape counseling center's ability to maintain confidentiality).

Any hesitation to disclose this sensitive information to a counselor restricts the ability of the counselor to evaluate with the battered woman the various ways to escape her abusive relationship and effect a full recovery.[61]

Confidentiality also is necessary to reestablish and protect the dignity of battered women. In a violent relationship, an abuser treats a battered woman as inferior and worthless, ignoring and ridiculing her feelings and ideas. To convince her that she is insignificant, an abuser often isolates a battered woman from everyone and everything she values. Assuring confidentiality demonstrates to a battered woman that her concerns and feelings are significant and worthy of protection, thus helping to rebuild her dignity. Forcing a counselor to betray a battered woman's confidences would further damage her dignity. Indeed, it would be a "great irony" that an attacker could safely confess to his attorney the details of the crime he has committed, with full confidence that this information is not available to others to be used against him during trial, but that the victim of such an assault has no such guarantee.[62]

V. A PSYCHOTHERAPIST-PATIENT PRIVILEGE FUNCTIONALLY DEFINED TO ENCOMPASS A COUNSELOR-BATTERED WOMAN PRIVILEGE IS JUSTIFIED IN THE LIGHT OF REASON AND EXPERIENCE.

Although, like all other privileges, the counseler-battered woman privilege would remove potentially relevant information from consideration by a judge or jury, it is justified because the benefit to society achieved by allowing the privilege is greater than the harm realized by not recognizing it.[63] The harm that results from not recognizing the privilege is manifest. Domestic violence results in physical and psychological injury to millions of women in this country every year. The insidious impact of the violence ripples through families, communities and even generations. It is indisputable that for both victims and society, domestic violence levies an enormous physical, mental and financial toll.

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[61] Rauch, *supra* note 55, at 46 (describing the need for complete and accurate details for a counselor to be able to assess the level of danger, design a safety plan, and to consider legal options).

[62] See *People v. Pena*, 487 N.Y.S.2d 935, 939 (Sup. Ct. 1985).

[63] See John H. Wigmore, *Wigmore on Evidence* § 2285, at 527 (McNaughton rev. 1961) (stating that an essential condition for

One of the most effective means to stop the violence and its consequential harm is for battered women to seek domestic violence counseling. Unless the courts clearly affirm a privilege that encompasses counselor-battered woman communications, battered women will be reluctant to seek treatment, let alone communicate freely during counseling sessions for fear that their abusers will retaliate against them simply because they sought help. Not only is this result intolerable in light of the increasing incidence of domestic violence, it is contrary to federal and state policy and legislation that both fund and promote domestic violence programs with the expectation that confidentiality will be sedulously protected. "Reason and experience" therefore justify this Court's articulation of a psychotherapist-patient privilege under Rule 501 that encompasses the relationship between counselors and battered women.

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recognition of privileged communication is that the injury that would inure to the relation by disclosure of the communications must be greater than the benefit thereby gained for correct disposal of litigation).

CONCLUSION

For these reasons, the Court should hold that Rule 501 permits federal courts to recognize a psychotherapist-patient privilege and that the Rule should be functionally defined to encompass a counselor-battered woman privilege.

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APPENDIX

APPENDIX

INTEREST OF THE AMICI CURIAE

The following organizations submit this brief as *amici curiae* in support of Respondents:

National Network to End Domestic Violence

The National Network to End Domestic Violence ("NNEDV") is a not-for-profit organization incorporated in the District of Columbia in 1995. NNEDV is a national network of state domestic violence coalitions, representing over 1,600 member programs nationally. NNEDV's mission is to end domestic violence through public policy and education.

Florida Coalition Against Domestic Violence

The Florida Coalition Against Domestic Violence, Inc. ("FCADV") is a not-for-profit organization incorporated in the State of Florida for the purpose of providing services and advocacy to the victims of domestic violence and their minor children. FCADV is a membership organization of thirty-eight certified domestic violence centers, serving more than 80,000 battered women and their dependent children in Florida. For more than seventeen years, it has advertised that its services are confidential. Pursuant to Florida statute, FCADV registers domestic violence advocates who are eligible to claim privilege in communications with victims of domestic violence, and its office monitors compliance with statutory mandates. It provides technical assistance to domestic violence programs in Florida about strategies for preventing any breach of confidential communications and for responding to and resisting requests for disclosure. It periodically offers training for domestic violence centers on a range of issues critical to assuring the privacy and confidentiality of communications of battered women with counsel/

advocates. FCADV has crafted various legislative initiatives and participated in public policy development in Florida to safeguard the confidentiality of communications and addresses/locations of battered women and children seeking to escape from violence.

Illinois Coalition Against Domestic Violence

The Illinois Coalition Against Domestic Violence ("ICADV") is a not-for-profit organization incorporated in the State of Illinois. Founded in 1978, ICADV is a statewide network of forty-three local domestic violence programs that provide services to domestic violence victims and their children, and that seek to prevent and eliminate domestic violence through community education and public policy advocacy. In FY 1995, 45,455 clients received services, of which 98.9 percent were battered women and their dependent children. ICADV has assisted in the development of various public policy initiatives at the state and federal levels, such as the Illinois Domestic Violence Act of 1986 (Ill. Ann. Stat. ch. 750, para. 60-227), to safeguard the confidentiality of communications and addresses/locations of domestic violence victims and their children.

Iowa Coalition Against Domestic Violence

The Iowa Coalition Against Domestic Violence ("Iowa CADV") is a non-profit organization, incorporated in the State of Iowa in 1985. Iowa CADV provides educational and technical assistance to domestic violence programs across Iowa and also acts on a statewide level to promote public policy and legislative issues on behalf of battered women and their interests. Iowa CADV is a membership organization of approximately thirty domestic violence projects. In FY 1995, these programs provided safe shelter for 4,383 battered women and their 5,684 children.

Kansas Coalition Against Sexual and Domestic Violence

The Kansas Coalition Against Sexual and Domestic Violence ("KCSDV") is a not-for-profit organization incorporated in the State of Kansas for the purpose of providing services and advocacy on behalf of victims of domestic violence and sexual assault. KCSDV is a membership organization of thirty shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, children's programs, and transitional housing projects for battered women and abused women and their children. All Kansas domestic violence programs that receive state funds must be accredited through KCSDV. The accreditation standards require that each program adopt a nondisclosure/confidentiality policy. KCSDV monitors the compliance with accreditation standards through the activities of an accreditation committee. KCSDV provides technical assistance to domestic violence organizations in Kansas about methods for preventing any breach of confidential communications and for responding and resisting requests for disclosure. KCSDV also offers technical support to appellate attorneys who represent programs ordered to disclose confidential information.

Maryland Network Against Domestic Violence

The Maryland Network Against Domestic Violence ("MNADV") is a not-for-profit organization incorporated in 1980 in Maryland for the purpose of providing services and advocacy on behalf of the victims of domestic violence and their minor children. MNADV is a membership organization comprised of shelters, hotlines, counseling programs, transitional services and legal advocacy projects for battered women and their dependent children. For the past fifteen years, MNADV has provided training and technical assistance to domestic violence programs, the bar, the courts and law enforcement agencies on issues of domestic violence.

Minnesota Program Development, Inc.

Minnesota Program Development, Inc. ("MPDI") is a non-profit advocacy project focused on the reform of the criminal justice system's response to domestic violence. MPDI houses several national domestic violence programs, including the Domestic Abuse Intervention Project, the Battered Women's Justice Project, and the technical assistance project for the United States Marine Corps' Coordinated Community Response to Spouse Abuse.

My Sisters' Place

My Sisters' Place is a private, not-for-profit agency established in the State of New York to promote healthy, non-violent family life by providing comprehensive programs, including advocacy, community education, and emergency residential services for abused women and their children.

National Organization for Men Against Sexism

The National Organization for Men Against Sexism is a non-profit organization incorporated in the State of Illinois, with a mission of community education to end sexism, heterosexism and racism. Its membership ranges from men who counsel batterers to the principal scholars in the field of Men's Studies.

Nebraska Domestic Violence Sexual Assault Coalition

The Nebraska Domestic Violence Sexual Assault Coalition ("NDVSAC") is a statewide advocacy organization committed to reducing violence against women and children in Nebraska. Its primary purpose is to provide training and technical assistance to the twenty-two community-based domestic violence and sexual assault programs throughout Nebraska. NDVSAC's broader mission is to increase public awareness and understanding about domestic violence and sexual assault and the impact this violence has on other major problems facing Nebraska, including child abuse, juvenile delinquency, and youth violence.

New Hampshire Coalition Against Domestic and Sexual Violence

The New Hampshire Coalition Against Domestic and Sexual Violence ("NHCADSV") is a non-profit organization incorporated in the State of New Hampshire for the purpose of providing services and advocacy on behalf of the victims of domestic violence and their minor children. NHCADSV is comprised of fourteen programs throughout New Hampshire that have been established to provide services to survivors of sexual assault and victims of domestic violence and their children. For eighteen years, it has advertised that its services are confidential. To that end, NHCADSV requires that each program affiliated with it comply with legislatively mandated requirements under New Hampshire's confidential communication statute. NHCADSV provides technical assistance to domestic violence programs in New Hampshire about strategies for preventing any breach of confidential communications and for responding to and resisting requests for disclosure. Additionally, it participated as intervenor in litigation concerning the introduction of Caller*ID services in New Hampshire to safeguard the privacy of telecommunications between battered women and counselors.

New Jersey Coalition for Battered Women

The New Jersey Coalition for Battered Women ("NJCBW") is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, NJCBW is a private, non-profit corporation whose members include all twenty-three domestic violence programs in New Jersey.

New York City Coalition of Battered Women's Advocates

The New York City Coalition of Battered Women's Advocates was formed in 1990 as a not-for-profit organization. It is comprised of eleven organizations dedicated to ending violence in the lives of women and children in New York City.

North Dakota Council on Abused Women's Services

The North Dakota Council on Abused Women's Services ("NDCAWS") is a non-profit coalition of 19 domestice violence and sexual assault advocacy organizations. NDCAWS has guarded the confidentiality between battered women and advocates by initiating state legislation, developing model policies for its members, and monitoring compliance with those policies. It has taken an active role in modifying the state laws and policies governing confidentiality. In the last North Dakota legislative session, for example, it was successful in securing passage of legislation protecting the counseling records of juveniles from their own parents, if it was determined that personal safety issues were at stake.

NOW Legal Defense and Education Fund

The NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. NOW LDEF has been engaged on many fronts in efforts to eliminate gender-motivated violence. Most notably, NOW LDEF chaired the national task force that was instrumental in passing the historic Violence Against Women Act. It maintains a national legal clearinghouse tracking legal developments under that legislation. NOW LDEF has participated as counsel and as *amicus curiae* in numerous cases in support of the rights of women who have been the victims of domestic and other gender-motivated violence.

Oklahoma Coalition Against Domestic Violence and Sexual Assault

The Oklahoma Coalition Against Domestic Violence and Sexual Assault ("OCDVSA") is a not-for-profit organization incorporated in Oklahoma for the purpose of providing advocacy on behalf of the victims of domestic violence and their minor children. OCDVSA is a membership organization of twenty-three shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth. For almost fifteen years, OCDVSA has provided training and technical assistance to domestic violence programs, the bar, the courts, and law enforcement agencies on issues of domestic violence and custody. For more than fifteen years, it has advertised that its services are confidential and that it safeguards information concerning whether an abused adult has sought or is receiving services; the content of communications, whether occurring on hotlines, in shelters, or in advocacy services; the specifics of services sought and rendered; the particulars of safety plans developed; and the confidentiality of shelter addresses.

Oregon Coalition Against Domestic and Sexual Violence

The Oregon Coalition Against Domestic and Sexual Violence ("OCADSV") is a non-profit corporation, incorporated under the laws of the State of Oregon since 1978. The OCADSV has thirty-one member programs that provide direct services to victims of domestic and sexual violence throughout Oregon. All member programs have adopted confidentiality policies to protect communications between advocates and service recipients. Advocates receive at least forty hours of training on domestic and sexual violence lay counseling as well as other services.

The majority of people who use OCADSV's services cannot afford private counseling. Its programs have successfully resisted a number of incidents where abusers attempted to use the legal system to locate and gain access to their victims.

Pennsylvania Coalition Against Domestic Violence

The Pennsylvania Coalition Against Domestic Violence, Inc. ("PCADV") is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of the victims of domestic violence and their minor children. PCADV is a membership organization of sixty-one shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth. For almost twenty years, PCADV has provided training and technical assistance to domestic violence programs, the bar, the courts, and law enforcement agencies on issues of domestic violence and custody. For more than twenty years, it has advertised that its services are confidential and that it safeguards whether an abused adult has sought or is receiving services; the content of communications, whether ocurring on hotlines, in shelters, or in advocacy services; the specifics of services sought and rendered; the particulars of safety plans developed; and the confidentiality of shelter addresses. To that end, PCADV requires that each program affiliated with it institute a confidentiality/non-disclosure policy, and its office monitors both content and compliance therewith. PCADV provides technical assistance to domestic violence programs in the Commonwealth about strategies for preventing any breach of confidential communications and for responding to and resisting requests for disclosure. It offers seminars for domestic violence centers on a range of issues critical to assuring the privacy and confidentiality of communications of battered women with counselor/advocates.

PCADV has crafted various legislative initiatives and participated in public policy development at the state and federal levels to safeguard the confidentiality of communications and addresses/locations of battered women and children seeking to escape from violence. PCADV was instrumental in assuring that the Model Code on Domestic and Family Violence, issued by the National Council of Juvenile and Family Court Judges, contained a victim/counselor privilege. It has authored portions of various scholarly and practice guides on confidential communications between battered women and advocates. PCADV is engaged in litigation and public policy development to safeguard the privacy of telecommunications between battered women and advocates.

The Roswell Refuge for Battered Adults

The Roswell Refuge for Battered Adults ("Roswell Refuge"), serving victims of domestic violence in Chaves County, New Mexico, is a member of the New Mexico Coalition Against Domestic Violence and provides confidential advocacy, shelter, and crisis intervention services to battered adults. Roswell Refuge has guaranteed confidentiality to all clients, except when the issues of child abuse, homicide, and/or suicide otherwise mandate.

SAFE Homes-Rape Crisis Coalition

The SAFE Homes-Rape Crisis Coalition ("SAFE Homes") is a not-for-profit organization in Spartanburg, South Carolina that provides services and advocacy on behalf of the victims of domestic violence and their minor children in Spartanburg, Cherokee and Union Counties. Sexual assault services are provided to victims in Spartanburg and Cherokee Counties. SAFE Homes' services include emergency shelter, a 24-hour hotline, counseling programs, support groups, legal advocacy and transitional housing.

Texas Council on Family Violence

The Texas Council on Family Violence ("TCFV") is a non-profit membership association founded in 1978, incorporated in the State of Texas. TCFV represents sixty-two shelters for battered women, twenty-six programs for batterers, and four family violence legal assistance programs, as well as individuals and other organizations working to end violence against women statewide. TCFV has also served as an advocate for battered women and children nationally by helping to formulate public policy, laws, and regulations on the federal level related to the crimes of violence against women.

Wisconsin Coalition Against Domestic Violence

The Wisconsin Coalition Against Domestic Violence ("WCADV") is a non-profit organization, incorporated in the State of Wisconsin. Founded in 1978, WCADV is a statewide membership organization of battered women, formerly battered women, domestic abuse programs, and individuals committed to ending domestic violence. The mission of the WCADV is to eliminate domestic violence by changing societal attitudes, practices and policies about women from diverse groups, their children, and violence. These goals are accomplished through education, advocacy, and social action.

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No. 95-266

Supreme Court, U.S.
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In The

Supreme Court of the United States

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October Term, 1995

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr., Deceased,

Petitioner,

vs.

MARYLU REDMOND, Hoffman Estates Police Officer and Village of Hoffman Estates, Illinois,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR AMICUS CURIAE, INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO IN SUPPORT OF AFFIRMANCE

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ISSUE

Is there a limited psychotherapist/patient privilege rooted in Federal Rule of Evidence 501 which, applied on a case by case basis, protects formal duty related counseling sessions between law enforcement officers and licensed clinical social workers?

THE *AMICUS CURIAE* AND ITS INTEREST

The *amicus curiae* is the International Union of Police Associations, AFL-CIO. Both the respondents and the petitioner have consented to the submission of this *amicus curiae* brief. The brief supports the respondent's argument that the decision of the Seventh Circuit in this case should be upheld.

The International Union of Police Associations, AFL-CIO ("I.U.P.A.") is extremely interested in, and qualified to comment upon, whether there is a privilege which protects formal duty related counseling sessions between law enforcement officers and licensed clinical social workers.

The I.U.P.A. is the AFL-CIO's law enforcement affiliate. It is composed of over three hundred affiliated police unions and associations representing over 80,000 working street level law enforcement officers in over four hundred law enforcement agencies throughout the United States, Canada and Mexico. The I.U.P.A. regularly represents the rights of individual officers during department internal affairs investigations, discipline cases, workers compensation matters, civil service hearings, and pension and employee disability boards of review and commissions. It represents its members in all job related matters, including those directly related to their physical and mental health.

In the 1960's the United States as a whole had 3.3 police officers for every violent crime reported per year. In 1993, it had 3.47 violent crimes reported for every police officer. A police officer today must deal with 11.45 times as much violent crime as his or her predecessor of even two decades ago. *See* Adam Wallinsky, *The Crisis of Public Order,* The Atlantic Monthly, July 1995, at 39. In Milwaukee in 1965 there were twenty-seven murders, thirty-three rapes, and 214 robberies. In 1990, when the city was smaller, there were 165 murders, 5,988 rapes, and 4,472 robberies. *Id.* These changes are reflected nation wide. The problems they generate are being struggled with in every law enforcement agency in which the I.U.P.A. has members.

The President and Congress are currently struggling over an effort to put 100,000 more officers on the streets. As Adam Walinsky has demonstrated in his July *Atlantic* article —

> If you wished to return to the ratio of police officers to violent crimes which gave many of us peace and security in the 1960's, we would have to add not 100,000 new police officers but about five million.

Id. at 40. The I.U.P.A. recognizes that such an increase in the number of officers is not likely. Those who represent working law enforcement officers have no choice but to invest every possible effort to protect the health, safety and family lives of those officers who must face the increasing stress of dealing with the current reality. The Seventh Circuit decision in this case recognized that reality:

> The need, and demand, for counseling services has skyrocketed during the past several years due to the rapid spread of violence and crime throughout our nation. Countless innocent bystanders, as well as law enforcement officers themselves, witness violent crimes and homicides. These unfortunate individuals . . . need and deserve help, support, and emotional release provided by confidential counseling.

Jaffee v. Redmond, 51 F.3d 1346, 1355 (7th Cir. 1995).

The I.U.P.A., its related Institute for Police Research, and its Milwaukee Police Association affiliate sponsored a major study of police officer stress and health undertaken by Dr. Lawrence Blum, a nationally prominent expert of police stress. The study was conducted in the City of Milwaukee in the wake of the infamous Dahmer incident. As a result of that study and the I.U.P.A.'s involvement in the United States Department of Justice's recent emphasis on community policing and placing more working officers on the streets, the I.U.P.A. has been particularly involved with the problems faced by police officers in an atmosphere of increasing violence on the streets of America.

The I.U.P.A. Executive Officers, President Sam Cabral and Secretary Treasurer Art Reddy, and its Executive Board have made dealing with the problem of stress and its impact on the working lives, health, family lives, and simple sanity of its members one of their highest priorities.

There is no issue of greater importance to the I.U.P.A. than insuring that law enforcement officers on the street, facing literally unbelievable stress arising from participating in and witnessing extreme traumatic events, face no impediments or unnecessary fears when deciding whether or not to accept formal, professional on the job counseling.

STATEMENT OF THE CASE

In 1991, Village of Hoffman Estates Police Officer Marylu Redmond responded to a fight at an apartment development at which she shot and killed Ricky Allen, Sr. Ricky Allen's shooting was the result of a split second, literally life or death situation, just like the situations faced by many law enforcement officers everyday.

As the Seventh Circuit noted in footnote 12 of its decision:

> Each of the witnesses to the shooting testified that no more than four or five seconds elapsed from the time Ricky Allen, Sr., carrying a butcher knife, emerged from the door of the apartment building until the time Officer Redmond fired her weapon. Officer Redmond was forced to make a life or death decision in a matter of seconds as she observed the butcher knife in the hand of the assailant move downward toward the back of his intended victim. [District Court] Judge Shadur commented that "one of the problems with [defendants' proposed instruction is that] the split second business is . . . so inconsistent with [Officer Redmond's] own testimony." The situation Officer Redmond faced did not become life-threatening until the very moment when she observed Ricky Allen, Sr. project the butcher knife he held raised above his head in a downward motion toward the back of his intended victim. For that matter of seconds before Allen reached the man he was pursuing, Officer Redmond had no time to cogitate, wait or reflect on the question of whether or not to use deadly force. But once Ricky Allen, Sr. came within striking distance of the man he was chasing, Officer Redmond was forced to make a split-second decision to discharge her weapon in an attempt to save the life of Allen's intended victim. The fact that Officer Redmond may have observed Ricky Allen, Sr. chasing another man in a time frame of four or five seconds prior to the fatal moment does not change the instantaneous and split-second nature of the decision she was forced to make.

Jaffee, 51 F.3d 1356 at n. 12.

As a result of her involvement in the shooting, Officer Redmond underwent over six months of therapy with a clinical social worker retained by her employer.

But the tragedy did not end there. Officer Redmond went through a trial as a result of the shooting where she was accused of an improper use of force. The district court instructed the jury that the insistence by both Officer Redmond and her counselor on a clinical social worker's confidentiality privilege could be used to draw a negative inference about what Officer Redmond may have said in counseling. The jury awarded Allen's estate over one half million dollars as a result.

Carrie Jaffee, Ricky Allen's mother, sued in the United States District Court seeking damages under 42 U.S.C. § 1983 and an Illinois "wrongful death" statute. At trial, the factual issue was whether Redmond's shooting of Allen was reasonable within the meaning of the Fourth and Fourteenth Amendments and the Illinois statute. The trial revealed considerable discrepancies as to what occurred outside the apartment house. Officer Redmond testified that she shot Allen as he chased another man with a butcher knife, and only after repeated warnings to drop the knife. Witnesses for the defense, Allen's relatives, testified that Allen was unarmed and posed no threat to anyone.

During pretrial discovery Allen's estate sought evidence concerning communications made between Officer Redmond and Karen Beyer, a clinical social worker, employed by the Village of Hoffman Estates to whom Redmond went for professional counseling after the incident. Redmond refused to answer questions regarding her counseling sessions and resisted a deposition of Beyer. She claimed that her confidentiality interest in post-traumatic counseling outweighed the government interest obtaining the evidence. Consequently, she argued, communications between she and Beyer were privileged within the meaning of Federal Rule of Evidence 501.

Eventually, the district court denied the privilege and sanctioned Officer Redmond for refusing to authorize the release of Beyer's notes. In addition, the district court instructed the jury that it could draw a negative inference from Redmond's refusal to produce the notes. The jury awarded Carrie Jaffee $545,000.

On appeal, the Seventh Circuit Court of Appeals reversed and remanded, finding that job related communications between law enforcement officers and licensed clinical social workers were protected by a limited psychotherapist/patient privilege under its application of Federal Rule of Evidence 501.

ARGUMENT

The *amicus curiae* brief does not restate or focus on the arguments set forth by the Seventh Circuit in its opinion or on those arguments raised most appropriately in respondent's brief. It also is not a point-by-point rebuttal of petitioner's brief. It does

not concern itself centrally with the treatment of general privilege law as addressed by the various Court of Appeals.[1] Rather, the

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[1] In this case the Seventh Circuit held that Federal Rule of Evidence 501 includes a psychotherapist/patient privilege. The extent of the privilege, and whether it applies in a specific case, should be determined by "balancing the interests protected by shielding the evidence sought with those advanced by disclosure". *Trammel v. United States*, 445 U.S. 40, 48 (1980); *In re Zuniga*, 714 F.2d 632, 644 (6th Cir. 1983). The Seventh Circuit then held that communications between counselors and officers during post-trauma therapy required confidentiality such that the privilege applied. The Second and Sixth Circuits have also recognized a psychotherapist/patient privilege in Rule 501. *See In Re Zuniga*, 714 F.2d 632 (6th Cir. 1983); *In Re Doe*, 964 F.2d 1325 (2d Cir. 1992). The Fifth, Ninth, Tenth, and Eleventh Circuits have rejected the privilege. However, the circuits denying the privilege usually faced criminal cases and correspondingly high government interests in admitting communications between counselors and criminal defendants. *See United States v. Butrum*, 17 F.3d 1299 (10th Cir. 1994) (The court rejected the psychotherapist/patient privilege, but specifically limited it's holding to criminal child abuse cases); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir.1989), *cert. denied*, 493 U.S. 906 (1989) (The court rejected the privilege in Grand Jury murder investigation); *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989) (The court rejected the privilege in firearms case, specifically stating that the privilege did not apply in federal criminal trials); *United States v. Meagher*, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976) (The court rejected the privilege in a bank robbery trial in which defendant pled insanity, noting that even Proposed Rule of Evidence 504 would not apply the privilege to cases in which mental condition was an element of the defense.); *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992) (The court refused to apply the privilege to a psychiatrist seeking to withhold a patient list during an I.R.S. investigation); *Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992) (The court refused to allow the privilege to prevent introduction of the fact that the plaintiff had received psychiatric treatment).

No Circuit besides the Seventh has reviewed a claim to a psychotherapist\patient privilege in a civil context where a police officer's interest in confidentiality far outweighs the plaintiffs need for one additional piece of evidence. In the context of an officer involved in trauma related counseling, the societal interest in exercising the privilege is significant. In

(Cont'd)

I.U.P.A., on behalf of working level law enforcement officers, seeks to set forth the need for a clear enunciation by the Court of a limited psychotherapist/patient privilege in the context of law enforcement post-traumatic event counseling.

No one disagrees with the basic framework of the law to be applied here. Under the Federal Rules of Evidence evidentiary privileges are controlled by "principals of common law as they are interpreted by the Courts of the United States in light of reason and experience." Fed. R. Evid. 501. The rules of privilege under Rule 501 are to be developed on a case by case basis using a test which balances the interests protected by shielding the evidence sought with those advanced by disclosure. *See Trammell v. United States,* 445 U.S. 40 (1980). The issue before the Court is whether the Seventh Circuit is correct in holding that —

> Officer Redmond, and all those placed in her most unfortunate circumstances are entitled to be protected in their desire to seek counseling after mortally wounding another human being in the line of duty. An individual who is troubled as the result of her participation in a violent and tragic event, such as this, displays a most commendable respect for human life and is a person well suited 'to protect and to serve.' Based on the facts and circumstances presented on this record, we recognize the existence of the psychotherapist/patient privilege in this Circuit and thus the confidential communications between Marylu Redmond and her licensed clinical social worker Karen Beyer are protected from compelled disclosure.

(Cont'd)
this precise situation, a civil case with a high personal and societal interest in a mentally healthy police force and a relatively low need for additional evidence, the balancing test favors application of the privilege.

Jaffee, 51 F.3d at 1357. Whatever the extent and limits of any counseling privilege, they must be sufficiently broad to protect police officers who seek professional counseling after on duty traumatic events. If a counseling privilege to that extent is not recognized and protected by this Court, it is highly unlikely that working police officers will seek or cooperate in post-traumatic counseling because:

(a) under this Court's *Miranda* rules, police counsel citizens every day that "whatever you say may be used against you";

(b) under its rule in *Garrity,* police are counseled in every internal affairs investigations that they need not cooperate unless they are immunized themselves:

(c) due to the nature of their job, they are extremely skeptical about "psycho babble"; and

(d) they suffer on a day-to-day basis at far higher than normal levels of stress without seeking counseling.

The inherent nature of police work causes police officers significant levels of stress and stress related physical and mental manifestations. Dr. Lawrence Blum, Ph.D., a clinical psychologist who has treated law enforcement officers for over 16 years, conducted a study of stress on police officers in Milwaukee, Wisconsin. Blum, "Final Report Milwaukee Police Association Interest Arbitration Hearings," April 15, 1994. In the study, Dr. Blum received clinical data and received anonymous questionnaires of approximately 1,000 police officers and conducted a revie of the literature of stress, occupational stress and police stress.

Dr. Blum reports that a substantial body of literature has studied the association of police stress and has found a strikingly greater proportion of health, family and emotional disturbances documented in police officers than in comparison groups.[2]

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[2] Dr. Blum reviewed and analysed over 450 reports, articles and books on these issues; including White, Biggerstaff and Grubb, *Factors of Stress Among Police Officers*, 12 Criminal Justice and Behavior, 111 (1985); Singleton and Teahan, *Effects of Job Related Stress on the Physical and Psychological Adjustment of Police Officers*, 6 Journal of Police Science and Administration, 355 (1978); Heiman, *Suicide Among Police*, 134 American Journal of Psychiatry, 1286 (1977); Anson, and Bloom, *Police Stress in an occupational context*, 16 Journal of Police Science and Administration, 229 (1988); French, *A Comparative Look at Stress and Strain in Policemen* in *Job Stress and the Police Officer: Identifying Stress Reduction Techniques* (1975); Cooper, *Stress in the Police Service*, 24 Journal of Occupational Medicine, 30 (1982); Greller, *Police Stress: Taking a Department-Wide Approach to Managing Stressors*, The Police Chief, 44 (1982); Grencik, *The Physical Fitness of Deputies Assigned to Patrol Function and its Relationship to the Formulation of Entrance Standards*, LEAA Final Report (1973); Grenrick, *Towards an Understanding of Stress in Job Stress and the Police Officer: Identifying Stress Reduction Techniques* (1975); Hageman, *Occupational Stress of Law Enforcement Officers and Marital and Familial Relationships*, 6 Journal of Police Science and Administration, 402 (1978); Hageman, *Responses of Police Rookie Officers to Stress*, 10 Journal of Police Science and Administration, 235 (1982); Johnson, *A Comperative Study of Stress Between Police Officers and Correctional Officers*, Master of Criminal Justice Thesis (1987); Kroes, *Psychological Stress and Police Work*, Paper presented at the Third Annual Symposium of the American Academy of Stress (1974); Kroes, *Society's Victim: The Policeman: An Analysis of Job Stress in Policing* (1975); Kroes, *Society's Victim: The Policeman* (1976); Kroes, *Job Stress and the Police Officer* (1975); Langone, *When Cops Crack Up*, Discover, 84 (1981); Lewis, *Toward an Understanding of Police Anomie*, 1 Journal of Police Science and Administration, 484 (1973); Maslach, *Burned-Out Cops and Their Families*, Psychology Today, 59 (1979); Niederhoffer, *The*
(Cont'd)

Frequently, police will experience post-traumatic stress symptoms which a civilian would recognize as needing treatment but which police identify as "nothing but the unpleasant side affects of the job." Final Report, at 75 .

Exceedingly high percentages of officers reported experiencing continued and/or repeated stress reactions such as feelings of fatigue even after rest, trouble falling asleep, multiple awakenings when sleeping, stiff painful feeling in muscles without injury, heart burn, being easily irritated or annoyed, feelings of nausea or sour stomach and backache or muscle spasm without injury. Dr. Blum found that these symptoms are caused by police officer's body's excessive prolonged maintenance in a "fight or flight" condition in which the body excretes excessive adrenaline, noradrenaline, adrenocorticotropic hormone and cortisol. Final report, at 4-5. Dr. Blum states

> the data reviewed in the literature, and my own clinical experience of 16 years of service to law enforcement, suggests clearly that psychological and psychosocial counseling,

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(Cont'd)
Police Family: From Station House to Ranch House (1971); Selye, *Police Stress*, 1 Police Stress Magazine, 1 (1981); Skolneck, *A Sketch of the Policeman's Working Personality*, Criminal Justice-Law and Politics (1972); Sparrow, *Coronary Heart Disease in Police Officers Participating in the Normative Aging Study*, 118 American Journal of Epidemiology, 508 (1983); Speilberger, *The Police Stress Survey: Sources of Stress in Law Enforcment*, Human Resources Institute, (1980); Stratton, *Post-Traumatic Stress: Study of Police Officers Involved in Shootings*, Psychological Reports, 127 (1984); Tang, *The Effects of Hardiness, Police Stress, and Life Stress on Police Officers' Illness and Absenteeism*, 21 Public Personnel Managment, 493 (1992); Violanti, *The Police Stress Process*, 11 Journal of Police Science and Administration, 112 (1984); Violanti, *The Police Stress Process*, 11 Journal of Police Science and Administration, 389 (1983); Wallace, *Stress and its Impact on the Law Enforcement Officer*, 4 Campus Law Enforcement Journal, 36 (1978).

> and psychological debriefing for dysphoric or damaging reactions developed in the course of their work, are critical components of officer wellness, safety, and viability.

[Letter Report of December 28, 1995].

The most critical time period in the development of post-traumatic stress symptoms is within the first 72-hours. The sooner an officer is "debriefed" or receives counseling within this period, the better his or her adjustment to the incident will be. Final Report, at 73. However, most of the encounters police face on the job which result in their developing post-traumatic reactions do not result in the officer receiving any psychological services. Final Report, at 37.

The report amply demonstrates that the current violent state of our society compels a need greater than ever before for officers to receive counseling. It is not only in the officer's individual interest to receive such counseling, but it is also in society's interest to have physically and emotionally healthy officers who are able to perform to the utmost of their ability. To meet this societal goal, society must encourage law enforcement officers to receive counseling and psychological services.

Without even addressing the impact on police officers, Petitioner dismisses the point that a lack of confidentiality will deter people from attaining psychotherapy. Petitioner's brief at at 29-30. However, law enforcement officers, unlike the public generally, are uniquely sensitive to the issues of confidentiality. If a police officer knows that his or her conversations with a counselor are not confidential and privileged, the officer will be even more reluctant to attend counseling.

As a direct result of their work, law enforcement officers develop a particular caution towards speaking to anyone. From their first day in academy training, officers are drilled that they must provide adequate *Miranda* warnings to anyone placed under arrest. As this Court required in *Miranda*, officers must warn suspects not to talk or the information could be used against the suspect. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Similarly, in *Garrity*, this Court also ruled that police officers must be advised in the course of an internal investigation that they should not speak because anything said could be used against them. *Garrity v. New Jersey*, 385 U.S. 493 (1967). The *Garrity* ruling requires that officers only speak in an internal investigation once they are first provided with immunity. Only after they receive such assurances can they then feel free to speak.

The nature of police work itself produces a sensitivity and caution towards speaking freely. As a result, police officers, more than other professions, need a guarantee of confidentiality before they can be free to speak with a counselor. Police already are reluctant to attend much needed counseling. In Dr. Blum's study, he notes that while police ranked third out of 130 occupations in the suicide rate, they only ranked 70th for availing themselves of services at community mental health centers. *See also*, Fell, Richard, and Wallace, "Psychological Job Stress and the Police Officer," *Journal of Police Science and Administration*, 8 at 142-144 (1980).

Dr. Blum found that

> It is also clear that police officers will not use these necessary counseling resources without absolute assurance of the confidentiality of their interactions with psychological, and psychosocial, resources.

[Blum Letter Report December 28, 1995].

CONCLUSION

In this context, the dangers to law enforcement and to society's ability to combat crime while developing a community policing[3] environment are very high. The evidentiary need for disclosure of the contents of post traumatic counselling of police officers in the interest of "the public's right to every man's evidence," a theoretical search for ultimate truth, a need to test the veracity of police officer, or even the need to ultimately guarantee citizen's rights against excessive police intrusion, do not and cannot outweigh the interest of society in developing a sane, humane police force equipped with a mature and healthy understanding of the dangers it's officers face everyday and the societal interest in the most advanced methods of professional "stress handling", readily available when needed, including *confidential* post-trauma counseling.

For all of the reasons set forth above the Court should uphold the Seventh Circuit rule establishing a limited psychotherapist/patient privilege for law enforcement officers seeking trauma counseling.

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[3] *See, e.g.*, Wadman, Olson, *Community Wellness: A New Theory of Policing* (1990); Goldstein, *Problem Oriented Policing* (1990);Goldstein and Susmilch, *The Problem Oriented Approach to Improving Police Service, A Project on Development of a Problem Oriented Approach to Police Service* (1981); Green and Mastrofski, *Community Policing: Rhetoric or Reality* (1988); Kelling, *Police and Communities: The Quiet Revolution*, National Institute of Justice and Harvard (1988); Pierce, Spaar and Briggs, *The Character of Police Work* (1984); and Reiss and Tonry (eds.), *Communities and Police* (1986).

Respectfully submitted

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IN THE
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CARRIE JAFFEE AS SPECIAL ADMINISTRATOR FOR
RICKY ALLEN, SR., DECEASED,
Petitioner,
v.
MARYLU REDMOND, HOFFMAN ESTATES POLICE OFFICER
AND VILLAGE OF HOFFMAN ESTATES, ILLINOIS,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN PSYCHOANALYTIC ASSOCIATION, DIVISION OF PSYCHOANALYSIS (39) OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, THE NATIONAL MEMBERSHIP COMMITTEE ON PSYCHOANALYSIS IN CLINICAL SOCIAL WORK, THE AMERICAN ACADEMY OF PSYCHOANALYSIS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question:

1. Whether federal courts in a civil action should treat as privileged confidential communications made by a patient to a licensed clinical social worker in the course of psychotherapeutic treatment.

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8 Wigmore, *Evidence* § 2285 (McNaughton rev. 1961) 17, 21

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

No. 95-266

CARRIE JAFFEE AS SPECIAL ADMINISTRATOR FOR
RICKY ALLEN, SR., DECEASED,
Petitioner,
v.

MARYLU REDMOND, HOFFMAN ESTATES POLICE OFFICER
AND VILLAGE OF HOFFMAN ESTATES, ILLINOIS,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN PSYCHOANALYTIC ASSOCIATION, DIVISION OF PSYCHOANALYSIS (39) OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, THE NATIONAL MEMBERSHIP COMMITTEE ON PSYCHOANALYSIS IN CLINICAL SOCIAL WORK, THE AMERICAN ACADEMY OF PSYCHOANALYSIS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

Amici are a consortium of organizations whose members are psychiatrists, psychologists, social workers and others who practice psychoanalysis and/or psychoanalytic psychotherapy, insight-based psychotherapies grounded in the principles and techniques first expounded by Sigmund Freud and developed and advanced over more than

75 years of clinical research by numerous psychoanalytic scholars. The American Psychoanalytic Association ("APsaA") is a professional organization of psychoanalysts throughout the United States. The Association is comprised of 40 affiliate societies and 29 training institutes in many cities and has about 3000 individual members. It is a regional association of the International Psychoanalytical Association. The Division of Psychoanalysis (39) is one of 49 divisions of the American Psychological Association. The greater than 3600 full members (not including student members) of Division 39 are psychologists interested in psychoanalysis, the overwhelming majority of whom practice psychoanalysis or psychoanalytic psychotherapy. The National Membership Committee on Psychoanalysis in Clinical Social Work ("NMCOP") is comprised of 500 clinical social workers who practice psychoanalysis and/or psychoanalytic psychotherapy. There are 13 area branches of the NMCOP in the United States. The NMCOP is affiliated with the National Federation of Societies for Clinical Social Work. The American Academy of Psychoanalysis is an organization of more than 800 psychiatrists (and some others who do not possess an M.D.) who have undergone extensive psychoanalytic training and practice psychoanalysis and psychoanalytic psychotherapy.

As a direct result of their extensive scholarly and clinical work in the areas of psychoanalysis and psychoanalytic psychotherapy, *Amici*'s members strongly believe that confidentiality is critical to the success of psychotherapeutic treatment. The recognition of a psychotherapist-patient privilege is, accordingly, of the utmost importance to *Amici's* members' ability successfully and ethically to practice their profession, and to the welfare of their patients. *Amici* therefore wish to present their views to assist the Court in deciding the present case.[1]

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

BACKGROUND

Effective psychotherapy requires that the communications between a psychotherapist and a patient remain confidential. Petitioner mistakenly maintains that there is no need for such confidentiality. Indeed, petitioner asserts that disclosure of these communications results in "therapeutic benefits." Pet. Br. 29. Petitioner deems the asserted need for confidentiality a "'counseling folklore.'" *Id.* at 26 (citation omitted).

Petitioner simply ignores the three ways in which confidentiality is critical to effective psychotherapy: (1) it enables individuals to obtain help in dealing with problems or feelings they may consider too shameful, troubling or socially embarrassing to share with family or friends; (2) it is critical to building the patient's trust in the psychotherapist and thereby fosters the "therapeutic alliance"; and (3) it is a critical prerequisite to full disclosure (or "free association"), the fundamental technique by which psychoanalysis and psychoanalytic psychotherapy accomplish their goals.

Petitioner's lack of understanding of psychotherapy leads her not only to denigrate the importance of confidentiality, but to overestimate the importance of patient-psychotherapist communications to the truth-seeking process of litigation. The full disclosure employed in psychoanalysis and psychoanalytic psychotherapy is not a process of identifying objective facts, but a technique designed to explore (through dreams, fantasies, etc.) unconscious factors that shape conscious thoughts or behavior. Psychoanalytic therapy thus gives rise to an extraordinarily intimate relationship in which patients divulge thoughts, feelings, dreams and fantasies that may have little correspondence to external reality. A fuller understanding of psychoanalysis and psychoanalytic psychotherapy, and the crucial importance of confidentiality to them, is essential to the Court's privilege analysis and to its analysis of patients' privacy rights.

1. Confidentiality enables individuals to obtain needed psychotherapy.

People generally seek out psychotherapy for help in dealing with those problems they experience as too shameful or troubling to be shared comfortably with family members, friends or co-workers. For example, a person who experienced unwanted sexual desires, or a law enforcement officer who experienced strong fears in the aftermath of a violent incident and did not want to disclose this to colleagues, might seek out psychotherapy for assistance in dealing with these concerns. In either of these instances and the myriad others that motivate people to seek such assistance, the public disclosure in court of the contents of the therapy would be embarrassing or even job-threatening. Indeed, given the social stigma still attached to the need for psychotherapy, public disclosure of the very fact that the individual had sought treatment might well prove detrimental.[2] See *Parham* v. *J.R.*, 442 U.S. 584, 600 (1979) (recognizing stigma associated with child who "has received psychiatric care"). In the absence of a privilege, many individuals will be deterred from seeking psychotherapy who currently do or might benefit from it. Thus, "[c]onfidentiality is essential for successful psychiatric treatment [for] [w]ithout it, patients would be hesitant to enter into a meaningful psychotherapeutic relationship." *Psychiatric Peer Review: Prelude and Promise* 175 (J. Hamilton ed., 1985).

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[2] For example, 55 percent of supervisors surveyed indicated that they would have a negative attitude towards an employee who had seen a psychiatrist. *See Psychiatric Peer Review: Prelude and Promise* 179 (J. Hamilton ed., 1985). The social stigma that attaches to those who seek psychotherapy is further evidenced by the fact that some patients forgo insurance coverage of their treatment rather than risk their employers finding out about it. *See* Statement of the American Psychiatric Association (by Jerome S. Beigler, M.D.) Before the Subcommittee on Government Information and Individual Rights of the Committee on Government Operations (Apr. 9, 1979).

2. Confidentiality is essential to the establishment of the "therapeutic alliance".

An important initial step in psychoanalysis and psychoanalytic psychotherapy is the establishment of a "therapeutic alliance." This consists of a positive working relationship between patient and therapist in which both commit to the common goal of furthering understanding of the patient's problems and conflicts. In a sound therapeutic alliance, the patient experiences trust, hopefulness with regard to the outcome of the treatment, and a willingness to cooperate with the rigors of therapeutic work. See 1 H. Kaplan & B. Sadock, *Comprehensive Textbook of Psychiatry* 470 (6th ed. 1995) ("*Textbook of Psychiatry*"). "No analysis can proceed without the formation of a rational, trusting therapeutic alliance." *Id.* at 1775.

Confidentiality is part of the core foundation for the building of the therapeutic alliance. Through it, the therapist demonstrates trustworthiness and concern first and foremost with the patient's well-being. Confidentiality is, accordingly, "a cornerstone of therapy; it is essential to the therapeutic alliance and setting which fosters the unfolding of the patient's problems and fantasies on every level." 1 R. Langs, *The Technique of Psychoanalytic Psychotherapy* 193 (1973). The possibility that a therapist might reveal in a court of law a patient's most troubling inner secrets would stand as a permanent obstacle to development of the necessary degree of patient trust in the therapist, and would pose a significant, and for many patients an insurmountable, barrier to effective treatment.

3. Without confidentiality psychotherapy would lose much of its efficacy.

A basic tenet of psychoanalytic therapy is that the patient should reveal to the therapist any thoughts, feelings, dreams, fantasies or sensations that come to mind during a treatment session, no matter how shameful or troubling the patient may find them to be. Thus, confidentiality is also essential to psychoanalytic therapy because it enables patients fully to disclose their thoughts or feelings without fear of public disclosure.

Petitioner concedes this point with respect to "psychoanalysis," Pet. Br. at 27, acknowledging that psychoanalysts "require 'uncensored access to all of their patient's thoughts and feelings,' " and that confidentiality is accordingly essential to this discipline. *Id.* (quoting Shuman, Weiner & Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 Int'l J. of L. & Psychol. 393, 416 (1986)). Petitioner appears to believe, however, that such imperatives are not "common" in the field of psychotherapy, and that they apply in " 'relatively few cases.' " *Id.*

Petitioner fundamentally misunderstands the field of psychotherapy. For the same reasons that classical psychoanalysis requires confidentiality, other, more widely-practiced forms of psychotherapy that also rely substantially on psychoanalytic principles and technique—generally termed "psychoanalytic psychotherapy"—likewise require it.[3] According to a recent survey, psychoanalytic psychotherapy "is the most common form of treatment among mental health professionals and is a highly valued form of treatment." L. Luborsky *et al.*,

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[3] Psychoanalytic psychotherapy "is based on fundamental dynamic formulations and techniques that derive from psychoanalysis." 2 H. Kaplan & B. Sadock, *Comprehensive Textbook of Psychiatry* 1783 (6th ed. 1995); *accord* I.H. Paul, *The Form and Technique of Psychotherapy* 9 (1978). However, in contrast to classical psychoanalysis in which the patient generally lies on a couch and sees the analyst for four to five 50-minute sessions per week, the patient and therapist in psychoanalytic psychotherapy generally sit face-to-face (although the couch may, at times, be used), and usually meet for one to three 45- to 50-minute sessions per week. *Id.* at 1779. Psychoanalytic psychotherapies are also more likely to draw, not only on classical psychoanalytic theory, but on other well-established theories as well. *See* A. Bergin & S. Garfield, *Handbook of Psychotherapy and Behavior Change* 181 (4th ed. 1994); 2 H. Kaplan & B. Sadock, *Comprehensive Textbook of Psychiatry* 1770 (6th ed. 1995).

Preface *in Psychodynamic Treatment Research: A Handbook for Clinical Practice* (N. Miller *et al.* eds., 1993).[4] *Amici* have extensive experience in the clinical practice of both classical psychoanalysis and psychoanalytic psychotherapy (collectively, "psychoanalytic therapy"). For the reasons that follow, full disclosure, and hence confidentiality, is an essential ingredient of all psychoanalytic therapy.

Psychoanalytic therapy starts from the premise that the human mind operates on both conscious and unconscious levels. The "conscious" mind consists of those thoughts and feelings of which we are aware. The "unconscious" encompasses those parts of our minds of which we are not aware. Psychoanalytic theory assumes that the conscious concerns and symptoms (*e.g.*, fear, anxiety, depression) that bring a person into psychotherapy are caused, at least in part, by unconscious factors.[5] See C. Brenner, *An*

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[4] Officer Redmond appears to have participated in an insight-based form of psychotherapy such as psychoanalytic psychotherapy. Ms. Beyer testified that her principal training was in "psychodynamic" psychotherapy. Dep. of Karen Beyer 61 (July 13, 1992). "Psychodynamic" therapies operate from the premise that "psychopathology is a consequence of repression and a lack and/or avoidance of self-knowledge about how one's mind works . . . . Accordingly, all psychodynamic therapists attempt to help their patients recover and reintegrate those parts of the patient that were lost to the unconscious and attempt to achieve some degree of insight . . . . [A]ll psychodynamic therapists presuppose that people have the capacity to change if they can achieve meaningful mental insight." T. Paolino, *Psychoanalytic Psychotherapy* 17 (1981).

[5] While such difficulties or symptoms might be provoked by a traumatic event such as the shooting incident in which Officer Redmond was involved, psychoanalytic therapy nonetheless assumes that a given individual's reaction to such an event (and individuals may react differently, with some being more troubled than others) largely reflects that person's conscious and unconscious psychological make-up. Thus, a psychoanalytic therapist assisting someone such as Officer Redmond would address both the conscious and unconscious factors that inform her response to the shooting. Such a treatment would likely employ full disclosure as well as the other techniques and principles discussed in this section.

Elementary Textbook of Psychoanalysis 9 (1973) (Freud discovered that "not only hysterical symptoms but also many other normal and pathological aspects of behavior and thinking were the result of what was going on unconsciously in the mind of the individual who exhibited them").

Stated simply, the central goal of psychoanalytic therapy is to help individuals become aware of and/or rework the unconscious factors that (unbeknownst to them) are shaping the way that they think, feel, act or react to a given situation. See D. Louisell, *The Psychologist in Today's Legal World: Part II*, 41 Minn. L. Rev. 731, 746-47 n.56 (1957) ("the very art of successful psychotherapy seems to consist in helping the patient learn for himself the causes of his conduct and the methods of correction").[6] Once this is done, the individual is able to use the abilities of the conscious mind—reason, understanding, intention—to deal better with the unconscious aspects of the mind that were causing the distressing symptoms, behaviors or reactions. In this way, psychoanalytic therapy uses insight to alleviate symptoms. "If a [symptom] can be traced back to the elements in the patient's mental life from which it originated, it simultaneously crumbles away and the patient is freed from it." S. Freud, *The Interpretation of Dreams, in* 4 *Standard Edition of the Complete Psychological Works of Sigmund Freud* 100 (1958) ("*Standard Edition*"). Thus it might be said that "the healing power of psychoanalysis lies . . . in the hoary dictum 'Know thyself.' " J. Kovel, *A Complete Guide to Therapy* 75 (1976).

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[6] The Illinois legislature has recognized that licensed clinical social workers such as Ms. Beyer utilize this principle in their work. Illinois law defines a licensed clinical social worker as one who provides "mental health services for the evaluation, treatment, and prevention of mental and emotional disorders . . . based on knowledge and theory of psychosocial development, behavior, psychopathology, *unconscious motivation*, interpersonal relationships, and environmental stress." Ill. Rev. Stat. ch. 225, para. 20/3 (1994) (emphasis added).

The central challenge of psychoanalytically-based psychotherapy lies in the fact that it is not easy to bring into conscious awareness that which is unconscious. Generally, emotions, thoughts or experiences remain out of consciousness because they are shameful, frightening or otherwise "not acceptable to the patient." American Psychoanalytic Association, *Psychoanalytic Terms and Concepts* 44 (1990); see H. Etchegoyen, *The Fundamentals of Psychoanalytic Technique* 9 (1991) ("things are forgotten if one does not wish to remember them, because they are painful, ugly and disagreeable, contrary to ethics and/or aesthetics"). Individuals develop strong unconscious defenses or "resistances" which function to keep knowledge of these disconcerting thoughts and feelings from becoming conscious. *Id.* To further patients' understanding, the psychoanalytic therapist helps them to overcome these "resistances" using techniques whose prerequisite is a safe, confidential treatment situation. See 1 *Psychiatry: the Personality Disorders and Neuroses* 2 (1985).

Full disclosure (or "free association")—a technique in which the patient is encouraged to say whatever comes to mind no matter how embarrassing, frightening, disturbing or irrelevant it may seem—is the principal method by which the patient and the therapist see beyond the patient's defenses and bring unconscious material into the light of consciousness. It is an essential component of both classical psychoanalysis and psychoanalytic psychotherapy. See *Psychoanalytic Terms and Concepts* at 78 ("[t]he basic procedure of psychoanalysis and psychoanalytic psychotherapy . . . [is that the patient should] express in words all thoughts, feelings, wishes, sensations, images and memories without reservation, as they spontaneously occur. . . . [T]he patient must often overcome conscious feelings of embarrassment, fear, shame, and guilt"). The purpose of full disclosure is *not* to ascertain objective facts or to establish the actual events surrounding a traumatic experience. Rather, the relaxing of the mind's internal editing allows unconscious material to emerge and to be observed by the psychotherapist and patient.

> The reason for the great value of having the patient relinquish conscious control of his thoughts is this: what the patient thinks and says under those circumstances is determined by *unconscious* thoughts and motives. Thus Freud, by listening to the patient's "free" associations—which were after all free only from *conscious* control—was able to get a picture, by inference, of what was going on unconsciously in his patient's mind.

C. Brenner, *An Elementary Textbook of Psychoanalysis* 9 (1973).[7] The patient's obligation to engage in full disclosure is referred to as the "fundamental rule" of psychoanalytic therapy. *Psychoanalytic Terms and Concepts* at 78.

A threat to the confidentiality of the psychotherapist-patient relationship, such as that which would result from the absence of a privilege, would profoundly impair the ability of a patient to disclose fully the thoughts that come to mind. As mentioned above, the patient must feel free to discuss *anything* with *no* exceptions. Thus, ideas that the patient experiences as shameful or disturbing, even the confidences of third parties, must be shared if they come to mind during the course of the analytic session.[8] In-

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[7] The unique window onto the unconscious that full disclosure provides has led some to equate this technique with the microscope or telescope. C. Brenner, *An Elementary Textbook of Psychoanalysis* 8 (1973). Like these other instruments, the patient's free association allows the observer (psychotherapist and patient) to see past the surface to the more profound realities that lie beyond.

[8] The failure to disclose any of these thoughts can serve as a defense against knowledge of the unconscious.

> It is very remarkable how the whole task becomes impossible if a reservation is allowed at any single place. But we have only to reflect what would happen if the right of asylum

deed, given the oftentimes troubling content of unconscious material (which is, in part, why it remains unconscious), it is precisely the most embarrassing, shameful and displeasing thoughts that a patient *should* express in a psychoanalytic therapy.

"[C]onfidentiality of the material . . . is a prerequisite for free association. No analysand succeeds in divesting himself of all defenses or controls unless he can be certain that the derivatives of his id will not become known beyond the confines of the analytic situation." 4 A. Freud, *The Writings of Anna Freud* 417 (1968); see S.H. Gray, *Quality Assurance and Utilization Review of Individual Medical Psychotherapies, in Manual of Psychiatric Quality Assurance Review* 159-66 (1992) (field data demonstrate that full disclosure depends on confidentiality). Confidentiality is, accordingly, critical to the effective practice of any psychoanalytic therapy. Without it, patients would be reluctant to disclose all that comes to mind and psychoanalytic technique would be severely impaired.

SUMMARY OF THE ARGUMENT

The five factors that the Court should consider in determining whether to recognize a privilege under Fed. R. Evid. 501 decidedly favor recognition of the psychotherapist-patient privilege.

1. Although the widespread adoption of state statutes recognizing the psychotherapist-patient privilege stunted the development of judicial common law dealing with psychotherapist-patient communications, most courts to consider the matter have found that "inviolability of confidence is essential to the achievement of the psycho-

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> existed at any one point in a town; how long would it be before all the riff-raff of the town had collected there?

S. Freud, *Further Recommendations on Technique*, *in* 12 *Standard Edition* 135-36 n.1.

therapeutic goal," *Allred* v. *State*, 554 P.2d 411, 417 (Alaska 1976), and have accordingly recognized the psychotherapist-patient privilege.

2. "Reason and experience" show that confidentiality is essential to effective psychoanalytic therapy and that the societal benefits of such treatments outweigh any adverse impact the recognition of a psychotherapist-patient privilege might have on the truth-seeking function of litigation. Over the past few decades, more and more Americans have sought the documented benefits of psychotherapy. In particular, psychoanalytic therapy can help police officers such as Officer Redmond to face and learn to accept unavoidable violent encounters rather than dealing with them through emotional numbing.

The failure to recognize a psychotherapist-patient privilege would prove disastrous for the effective practice of psychoanalytic therapy. Many who could benefit from psychoanalytic therapy, including police officers, would be deterred from seeking it due to the fear of disclosure in court. Moreover, the threat of disclosure would severely undermine the "therapeutic alliance"—the collaborative relationship between therapist and patient that is essential to any successful psychoanalytic therapy. Finally, the central technique of all psychoanalytic therapy is premised on the patient's willingness to disclose to the therapist all thoughts, feelings, fantasies and dreams that come to mind. The lack of a privilege would destroy the protected atmosphere that makes such communications possible and would, accordingly, seriously impair the efficacy of psychoanalytic therapy.

By contrast, the benefits to litigation from the absence of a privilege are minimal. In most cases parties will have other means (*e.g.*, deposition, trial testimony) of obtaining the patient's version of the facts. Moreover, the patient's disclosures to the therapist are inherently unreliable as evidence since psychoanalytic therapy focuses not on reconstructing objective facts, but on furthering understanding of the patient's internal reality through fantasies, dreams and imaginings.

3. Every State in the nation recognizes a psychotherapist-patient privilege by statute. See Appendix A. Comity accordingly favors federal recognition of the privilege. To do otherwise would create the risk of inequitable administration of laws and incentives for unseemly "forum shopping" that this Court condemned in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

4. Proposed Rule of Evidence 504, promulgated by the Court in 1972, contained a psychotherapist-patient privilege. While Congress substituted Rule 501 in place of the Court's proposals, these proposals nonetheless serve as guidance and favor recognition of the privilege.

5. Psychoanalytic therapy requires patients to reveal their conscious and unconscious thoughts, feelings, dreams and fantasies no matter how shameful or troubling. Psychoanalytic therapy accordingly implicates the patient's privacy to a greater degree than almost any other human relationship. The Court has consistently construed acts of Congress to avoid raising "difficult and sensitive" constitutional questions. *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979). The Court should construe Rule 501 to require recognition of the psychotherapist-patient privilege so as to avoid implicating Officer Redmond's privacy rights. See *Whalen* v. *Roe*, 429 U.S. 589, 599 (1977); *Doe* v. *City of New York*, 15 F.3d 264 (2d Cir. 1994); *United States* v. *Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980).

ARGUMENT

THE COURT SHOULD RECOGNIZE A PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER FEDERAL RULE OF EVIDENCE 501.

Federal Rule of Evidence 501, which governs federal evidentiary privileges, provides that:

> [e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules proscribed by the Supreme Court pursuant to statutory authority, the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed. R. Evid. 501.

In applying Rule 501, this Court should consider five factors. First, it should look to "common law" privilege doctrines. *Id.* Second, it should seek to build on these doctrines "in the light of reason and experience."[9] *Id.* Third, "a strong policy of comity" requires federal courts to recognize the privileges established by state law "where this can be accomplished at no substantial cost to federal substantive and procedural policy." *United States* v. *King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976); see also *United States* v. *Gillock*, 445 U.S. 360, 368 n.8 (1980). Fourth, the proposed privilege rules that this Court promulgated in 1972 but that Congress replaced with the current Rule 501 provide guidance concerning the scope of federal privileges. See *In re Grand Jury Investigation*, 918 F.2d 374, 380 (3d Cir. 1990). Finally, the Court should construe Rule 501 so as to avoid raising "difficult and sensitive" constitutional questions. See *NLRB*, 440 U.S. at 507. In the present case, all five of these factors decidedly favor recognition of the psychotherapist-patient privilege as a matter of federal law.[10]

A. Common law courts have recognized a psychotherapist-patient privilege.

The common law traditionally held as privileged confidential communications between husband and wife, and between attorney and client, on the grounds that the need for frank communication in these relationships outweighed the litigation need for disclosure. See *McCormick on Evidence* 180, 201 (3d ed. 1984).

Judicial development of a comparable common law privilege for psychotherapist-patient communications has largely been truncated by the widespread adoption of State statutes extending privileged status to such communications. See Appendix A. Nevertheless, prior to these State legislative activities, several courts applied the logic underlying the attorney-client and marital privileges and recognized a psychotherapist-patient privilege as a matter of common law.

For example, in *Allred* v. *State*, 554 P.2d 411 (Alaska 1976), the Supreme Court of Alaska considered whether to extend a privilege to defendant's in-custody communications to his drug program coordinator and counselor. The court found that the relationship between a patient and his therapist "is unquestionably one which should be fostered." *Id.* at 417. It further found that confidentiality is essential to the success of psychotherapeutic treatment because "[i]n therapy the patient must often lay bare his entire inner life, including his fantasies, his past behavior, and his feelings of guilt or shame." *Id.* The Court accordingly concluded that the damage to the psychotherapeutic relationship from fear of disclosure "heavily" outweighed the competing litigation interest in full information. *Id.* at 418. It recognized a psychotherapist-patient privilege as a matter of State common law. *Id.*[11] Other State courts have done the same. See *State* v. *Evans,* 454 P.2d 976 (Ariz. 1969); *Binder* v. *Ruvell,* No. 52-C-2535 (Cir. Ct., Cook Cty., Ill. June 24, 1952), *reported in* 150 J.A.M.A. 1241 (1952) (unpublished decision). Petitioner has cited no countervailing common law authority. The common law favors recognition of the psychotherapist-patient privilege.

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[9] Congress expressly did not intend Rule 501 to "freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,' and to leave the door open to change." *United States v. Trammel*, 445 U.S. 40, 47 (1980) (quoting 120 Cong. Rec. 40891 (1974) (Statement of Rep. Hungate); H.R. Rep. No. 93-650 at 8 (1973)).

[10] *Amici* will not focus on the second question presented, regarding the extension of this privilege to licensed clinical social workers, since several other *amici* are doing so. *Amici* favor Respondents' position as to both questions presented.

B. "Reason and experience" strongly favor recognition of a psychotherapist-patient privilege.

In applying the "reason and experience" prong of Rule 501, courts have relied on four factors enunciated by Dean Wigmore. See, *e.g., United States* v. *Friedman,* 636 F. Supp. 462 (S.D.N.Y. 1986) (adopting Wigmore's formulation). These are:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 Wigmore, *Evidence* § 2285 (McNaughton rev. 1961) (emphasis omitted). All four of these factors weigh heavily in favor of recognizing a psychotherapist-patient privilege.

1. As explained above, psychotherapy requires patients to reveal to the therapist the most troubling, unpleasant and shameful aspects of their inner lives. " 'The . . . patient confides more utterly than anyone else in the world . . . . [H]e lays bare his entire self, his dreams, his fantasies, his sins, and his shame." *Taylor* v. *United States,* 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting M. Guttmacher & H. Weihofen, *Psychiatry and the Law* 272 (1952)). Patients make these intimate disclosures with the expectation that they will be held in confidence; indeed, without such an expectation the disclosures would not occur.

Recognizing that such disclosure can only take place in an atmosphere of complete trust and confidentiality, psychotherapists have made it their professional duty to keep the confidences shared with them. For example, the American Psychoanalytic Association's code of professional ethics requires that

> Except as required by law, a psychoanalyst may not reveal the confidences entrusted to him in the course of his professional work, or the particularities that he may observe in the characters of patients. Should he be required by a court of law to give testimony relating to the confidences of his patient, he should make use of all legal means to safeguard his patient's right to confidentiality.

American Psychoanalytic Association, *Principles of Ethics for Psychoanalysts and Provisions for Implementation of the Principles of Ethics for Psychoanalysts* § 6 (1983); accord American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct* § 5 (1992);

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[11] The court, however, declined to apply the privilege on the facts before it because the communications at issue did not occur during psychotherapy and the drug program coordinator to whom the defendant had spoken was not a psychotherapist. *Allred* v. *State,* 554 P.2d 411, 418-22 (Alaska 1976).

American Psychiatric Association, *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* § 4 (1995); National Federation of Societies for Clinical Social Work, *Code of Ethics* § 5 (1988).[12] In sum, the psychotherapist-patient relationship is a highly confidential one and each patient understands this at the commencement of treatment.

2. As discussed above, confidentiality is critical to the success of the psychotherapist-patient relationship in at least three ways. First, many individuals who could benefit from psychotherapy will be deterred from doing so in the absence of a privilege. Second, the therapist's demonstrated willingness to keep the patient's confidence is critical to the establishment of a sound "therapeutic alliance." A threat of disclosure such as that posed in the absence of a privilege will undermine this core precondition of successful treatment.

Finally, the threat of disclosure will interfere with a patient's ability to reveal fully what is on the patient's mind. If, as petitioner argues here, a psychotherapist could be required in a civil action to testify as to the contents of the treatment, patients would be unwilling or unable to engage in psychotherapy's most central technique. Few patients can be expected to lay bare their most private and potentially embarrassing thoughts, wishes and fantasies knowing they may someday be disclosed in civil judicial proceedings. This chilling effect would in turn deny psychoanalytic therapists the uncensored access to their patients' thoughts and feelings that is the *sine qua*

non of their practice. The effect would be akin to stopping-up the general practitioner's stethoscope or taking away the orthopedist's X-ray machine. Psychotherapy, as a field, would suffer enormously in its ability to help people such as Officer Redmond better to resolve their inner difficulties and thereby become more productive members of society.

3. The confidential relationship between patient and therapist is one society should protect and foster. The past century of rapid economic and social change has subjected many Americans to "unprecedented psychic demands" at the same time as it has isolated them from the kinship, religious and other ties that might, in an earlier era, have offered them support. R. Bellah *et al.*, *Habits of the Heart: Individualism and Commitment in American Life* 119-21 (1985). During this same period, the number of Americans utilizing the mental health professions has increased steadily, more than tripling between 1965 and 1985 alone. *Id.* at 121.

Individuals seek out psychoanalysis and psychoanalytic psychotherapy because these treatments offer important benefits. For example, psychoanalysis and psychoanalytic psychotherapy can help to improve marital relations, work performance and overall social adjustment. A. Bergin & S. Garfield, *Handbook of Psychotherapy and Behavior Change* 148 (4th ed. 1994). They can also help to alleviate specific symptoms such as sleep or eating disorders, anxiety, or depression. *Id.* Individuals who participate in these treatments also commonly experience a sense of liberation from internal inhibitions that results in increased creativity and productivity. 1 *Textbook of Psychiatry* at 473.

These benefits are particularly evident in the area of law enforcement, as this case illustrates. Police officers such as Officer Redmond confront violence, personal tragedy, and danger nearly every working day. This stressful environment may lead to various symptoms including emotional numbing and frustration that can interfere with the officer's interaction with community members. See S. Marans, *Community Violence and Children's Development: Collaborative Interventions, in* 11 *The Child in the Family* 109, 117 (C. Chiland & J.G. Young eds., 1994); *cf.* 1 *Textbook of Psychiatry* at 1231-32.

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[12] Recognizing the threat to confidentiality posed by the one listed exception (*i.e.*, disclosures required by a court of law), representatives of the various practitioners of psychoanalysis and psychotherapy have successfully lobbied on behalf of numerous State laws that extend a privilege to patient-therapist discussions. For example, a representative of the American Psychoanalytic Association participated in the drafting of the Illinois privilege statute under which Officer Redmond obtained protection from discovery with respect to the State law claims against her.

Through psychotherapy, officers such as Officer Redmond can learn to face and accept the strong feelings raised by unavoidable stressful and violent encounters rather than blocking these feelings out. *Id.* at 1235. This will, in turn, help such officers to remain empathetic and effective in their interactions with the community. Officer Redmond's decision to seek treatment in the aftermath of the shooting of Ricky Allen is exactly the sort of response society should encourage and support. Protecting the confidentiality of Officer Redmond's treatment through recognition of a psychotherapist-patient privilege will make it easier for her, and others like her, to seek treatment when they need it.[13] The privilege thereby promotes safer communities and more effective law enforcement, in addition to better adjusted and more productive individuals.

The benefits of psychoanalysis and psychoanalytic psychotherapy are well-documented. Rigorous studies of psychoanalytic treatments conducted by the Menninger Foundation, the Columbia Psychoanalytic Center, the Boston Psychoanalytic Institute and the New York Psychoanalytic Institute between 1954 and 1984 "confirm that patients suitable for psychoanalysis derive therapeutic benefit." H. Bachrach *et al., On the Efficacy of Psychoanalysis,* 39 J. Am. Psychoanalytic Ass'n 871, 911

(1991). Empirical studies of psychoanalytic psychotherapy have similarly concluded that "a broad range of therapies, when offered by skillful, wise and stable therapists, are likely to result in appreciable gains for the client." A. Bergin & S. Garfield, *Handbook of Psychotherapy and Behavior Change* 180 (4th ed. 1994); see generally, N. Doidge, *Empirical Evidence for the Core Clinical Concepts and Efficacy of Psychoanalytic Psychotherapies: An Overview* (Jan. 1995) (unpublished manuscript). Moreover, a recent Consumer Reports survey of participants in psychotherapy concluded that "[t]he majority . . . were highly satisfied with the care they received. Most had made strides toward resolving the problems that led to treatment, and almost all said life had become more manageable." 60 *Consumer Reports* No. 11 at 734 (Nov. 1995). Psychoanalysis and psychoanalytic psychotherapy thus provide substantial benefits to many Americans and these disciplines ought to be "fostered." 8 Wigmore, *Evidence* § 2285 (McNaughton rev. 1961).

4. The societal benefits promoted by recognition of a psychotherapist-patient privilege outweigh any detriment to the truth-seeking function of civil litigation. Indeed, the balance of benefits to litigation harms is at least comparable to that justifying recognition of the attorney-client privilege. See *Upjohn Co.* v. *United States,* 449 U.S. 383, 389-90 (1981). In *Upjohn,* the Court extended the attorney-client privilege to the communications between a company's attorneys and its executives and managers, including those not in control positions, on the grounds that an attorney must " 'know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.' " *Id.* at 389 (quoting *Trammel* v. *United States,* 445 U.S. 40, 51 (1980)).

As described above, full disclosure is equally essential to the "professional mission" of the psychotherapist. Indeed, whereas an attorney has other avenues of fact-gathering (*e.g.* documents), the psychotherapist is limited to his or her patient's full verbal disclosure upon which the entire success of the therapy relies. This therapy, in turn, helps patients, be they law enforcement officers such as Officer Redmond or others, to come to terms with problems that cause them much distress and that they deem too shameful or embarrassing to share with others. Successful therapy benefits not only the psychological and physical health of the patients themselves, but often their friends, families, co-workers and the communities in which they work and live. These benefits are at least as important to society as the promotion of the adversarial relationship.

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[13] In the absence of a privilege, on the other hand, a prudent attorney might well advise law enforcement officer clients *not* to seek psychotherapeutic treatment where a wrongful death charge or other legal claim is pending or threatened. Law enforcement officers would face a Hobson's choice between seeking treatment which will increase their legal exposure, or foregoing the benefits of psychotherapy.

Moreover, as in the case of the attorney-client relationship, the benefits of recognizing a psychotherapist-patient privilege far outweigh any detriment to the truth-seeking function. First, as this case illustrates, the psyhotherapist-patient privilege generally does not preclude access to the only source of evidence. Officer Redmond testified at trial as to her recollections of the shooting and petitioner had an opportunity to cross-examine her. J.A. 122-67. Moreover, there were numerous eye witnesses to the shooting in addition to Officer Redmond, four of whom testified at trial. Thus, petitioner had ample means of obtaining evidence about the shooting and Officer Redmond's recollection of it, and the discovery she sought with respect to Officer Redmond's confidential communications to her psychotherapist was at best cumulative and duplicative. *Cf.* Fed. R. Civ. P. 26(b)(2).

Second, unlike attorney-client confidences, patient-therapist communications are not necessarily or even likely to be sources of objective evidence. In the attorney-client context, communications are generally aimed at discovering facts that are relevant to the legal issue of concern. Full disclosure in the psychotherapeutic context, by contrast, is not a process concerned with identifying and establishing objective facts but rather a technique designed to explore the patient's inner perceptions, concerns and difficulties. Patient-therapist confidences, therefore, are generally not reliable sources of "evidence" since they necessarily incorporate feelings and fantasies that, while they have great relevance to the patient's inner life, may bear very little correspondence to external reality.

In sum, the societal benefits that accrue from recognition of the psychotherapist-patient privilege far outweigh the litigation interest in disclosure. Accordingly, "reason and experience" support recognition of the psychotherapist-patient privilege.

C. Every State recognizes a psychotherapist-patient privilege by statute.

Principles of comity require that federal courts recognize the privileges established by State statute "where this can be accomplished at no substantial cost to federal substantive and procedural policy." *United States* v. *King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976); see also *United States* v. *Gillock*, 445 U.S. 360, 368 n.8 (1980). To do otherwise would create precisely the risk of inequitable administration of the laws and incentives for unseemly "forum shopping" that this Court condemned in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). See *Hanna* v. *Plumer*, 380 U.S. 460, 467 (1965).

Every State has recognized a psychotherapist-patient privilege by statute. See Appendix A. Section 110 of the Illinois Civil Liabilities Code is illustrative. It states that, with a few listed exceptions, "in any civil, criminal, administrative or legislative proceeding . . . a recipient, and a therapist on behalf and in the interest of a recipient, has the privilege to refuse to disclose and to prevent the disclosure of the recipient's record or communications." Ill. Rev. Stat. ch. 740, para. 110/10(a) (1994).[14] Where

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[14] The Illinois statute defines "recipient" as "a person who is receiving or has received mental health or developmental disabili-

State statutes universally embrace a privilege federal courts are generally persuaded to do the same. See, *e.g.*, *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992) (psychotherapist-patient privilege); *In re Grand Jury Investigation*, 918 F.2d 374, 381 & n.10 (3d Cir. 1990) (clergy-communicant privilege). The unambiguous and widespread State statutory support for the psychotherapist-patient privilege weighs heavily in favor of this Court's recognition of such a privilege.[15]

D. This Court recognized the importance of a psychotherapist-patient privilege in proposed Rule 504.

In 1972, this Court promulgated and submitted to Congress twelve privilege rules, nine of which concerned specific privileges. While Congress substituted Rule 501 in place of these proposed rules, they nonetheless "provide a useful reference point and offer guidance in defining the existence and scope of evidentiary privileges in the federal courts." *In re Grand Jury Investigation*, 918 F.2d at 380.

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ties services." Ill. Rev. Stat. ch. 740, para. 110/2 (1994). It defines "therapist" as "a psychiatrist, physician, psychologist, social worker, or nurse providing mental health or developmental disabilities services." *Id.*

[15] Federal regulatory authorities have also recognized the need for confidentiality with respect to treatments that carry with them social stigmas. For example, Department of Health and Human Service regulations strictly protect the confidentiality of alcohol and drug abuse patient records. *See* 42 C.F.R. § 2.1 *et seq.* (1994). These regulations are intended to promote treatment by "insur[ing] that an alcohol or drug abuse patient in a federally assisted alcohol or drug abuse program is not made more vulnerable by reason of the availability of his or her patient record than an individual who has an alcohol or drug problem and who does not seek treatment." 42 C.F.R. § 2.3(b)(2) (1994). As discussed above, these same concerns apply in the psychotherapeutic treatment context. These regulations illustrate that recognition of a psychotherapist-patient privilege is consistent with, and can therefore be accomplished at no substantial cost to, federal policy.

Proposed Rule 504 provided for a psychotherapist-patient privilege. It stated that

> [a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition . . . among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.[16]

2 J. Weinstein, *Weinstein's Evidence*, ¶ 504-1. The Court's decision to promulgate this rule is "useful in furnishing guidance under Rule 501," *id.*, ¶ 504-3, and provides further support for the privilege.

E. Failure to recognize a psychotherapist-patient privilege would raise "difficult and sensitive" constitutional questions concerning patient privacy.

The Court has recognized that individuals possess a constitutional privacy interest in "avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U.S. 589, 599 (1977); accord *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977). For example, in *Whalen* the Court considered a State of New York policy that required physicians who prescribed Schedule II drugs (such as opium, cocaine or methadone) to provide to the State health department information regarding the drug prescribed and the patient's identity. *Whalen*, 429 U.S. at 593. The Court held that this disclosure of personal medical information implicated the patients' right to privacy, *id.* at 599, although it upheld the program on the ground that the State had taken sufficient security precautions to safeguard this constitutional interest.

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[16] Although Rule 504 defined "psychotherapist" as encompassing only psychiatrists and licensed and certified psychologists, this narrow definition is out-of-date. Many State privilege statutes currently include licensed clinical social workers such as Ms. Beyer. *See* Appendix B.

More recently the Second Circuit, applying *Whalen*, held that individuals possess a privacy right in "intensely personal matter[s]" such as their HIV status, and that an individual could accordingly maintain a Section 1983 action against a State agency that had disclosed his HIV-positive status without his consent. *Doe* v. *City of New York*, 15 F.3d 264, 265 (2d Cir. 1994). The Second Circuit stated that the privacy right to control the disclosure of one's personal matters "can be characterized as a right to 'confidentiality,'" *id.* at 267, and that "the right to confidentiality includes the right to protection regarding information about the state of one's health." *Id.*; accord *United States* v. *Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980).

Officer Redmond's privacy interest in the substance of her conversations with Ms. Beyer is stronger than that implicated in *Whalen* or *Doe, supra.* In standard privacy cases such as *Doe*, plaintiffs assert a privacy interest in information that they possess (*e.g.*, HIV status) but do not wish to share with others. Information of this nature is, of course, disclosed in psychotherapy as well. In addition, psychotherapy brings to light information about the unconscious that even the *patients themselves* were not aware of prior to the treatment. Such information emanates from the very core of the patient's personality. "'The psychiatric patient confides more utterly than anyone else in the world. . . . [H]e lays bare his entire self, his dreams, his fantasies, his sins, and his shame.'" *Taylor* v. *United States*, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting M. Guttmacher & H. Weihofen, *Psychiatry and the Law* 272 (1952)). To disclose to third-parties personal information that the patient has uncovered through use of the powerful tool of psychotherapy would constitute a more profund invasion of personal privacy than that which implicated the privacy right in *Doe*.

In the absence of a clear expression by Congress, this Court has consistently construed acts of Congress to avoid raising "difficult and sensitive" constitutional questions. *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979). In the present case, allowing petitioner to discover the substance of Officer Redmond's communications with Ms. Beyer will profoundly implicate Officer Redmond's privacy rights. See *In re Doe*, 964 F.2d 1325, 1328-29 (2d Cir. 1992); *Caesar* v. *Mountanos*, 542 F.2d 1064, 1067 n.9 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *United States* v. *Layton*, 90 F.R.D. 520, 523 (N.D. Cal. 1981); *United States* v. *Brown*, 479 F. Supp. 1247, 1254 & n.8 (D. Md. 1979). This Court should accordingly construe Rule 501 to require recognition of a psychotherapist-patient privilege so as to avoid this intrusion into Officer Redmond's "zone of privacy."

In sum, all five factors to be considered under Rule 501 point strongly towards recognition of the psychotherapist-patient privilege as a matter of federal law.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit recognizing a psychotherapist-patient privilege as a matter of federal law should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATE STATUTES RECOGNIZING A PSYCHOTHERAPIST-PATIENT PRIVILEGE

Ala. Code § 34-26-2 (1991); Alaska Stat. § 08.86.200 (1991 & Supp. 1995) & Alaska R. Evid. 504; Ariz. Rev. Stat. Ann. § 32-2085 (1992); Ark. Code Ann. § 17-96-105 (Michie 1992) & Ark. R. Evid. 503; Cal. Evid. Code §§ 1010.5, 1014 et seq. (Deering 1986 & Supp. 1994); Colo. Rev. Stat. § 13-90-107(g) (1987 & Supp. 1995); Conn. Gen. Stat. Ann. § 52-146(c) et seq. (West 1991 & Supp. 1995); Del. R. Evid. 503; D.C. Code Ann. § 14-307 (1995); Fla. Stat. ch. § 90-503 (West 1979 & Supp. 1995); Ga. Code Ann. § 43-39-1 (1994); Haw. Rev. Stat. Ann. tit. 33 § 626-1 (1995) (Rule 504.1); Idaho Code § 54.2314 (1994); Ill. Rev. Stat. ch. 740, para. 110/10 (1994); Ind. Code § 25-33-1-17 (1993); Iowa Code Ann. § 622.10 (West Supp. 1995); Kan. Stat. Ann. § 74-5323 (1992); Ky. Rev. Stat. Ann. § 421.215 (Michie/Bobbs-Merrill 1992); La. Rev. Stat. Ann. § 13:3734 (West 1991 & Supp. 1995); Maine R. Evid. 503; Md. Code Ann. Cts. & Jud. Proc. § 9-109 (1989 & Supp. 1993); Mass. Gen. L. ch. 233, § 20B (West 1986 & Supp. 1994); Mich. Comp. Laws Ann. § 330.1750 (1992); Minn. Stat. Ann. § 595.02(g) (West 1988 & Supp. 1995); Miss. Code Ann. § 73-31-29 (1989); Mo. Ann. Stat. § 337.055 (Vernon 1989); Mont. Code Ann. § 26-1-807 (1993); Neb. Rev. Stat. § 27-504 (1989); Nev. Rev. Stat. Ann. § 49.215 et seq. (Michie 1986 & Supp. 1993); N.H. Rev. Stat. Ann. § 330-A-19 (1995); N.J. Rev. Stat. § 45:14B-28 (1995); N.M. R. Evid. 11-504; N.Y. Civ. Prac. L. & R. 4507 (McKinney 1992); N.C. Gen. Stat. § 8-53.3 (1995); N.D. R. Evid. 503; Ohio Rev. Code Ann. § 4723.19 (Anderson 1994); Okla. Stat. Ann. tit. 12, § 2503 (West 1993); Or. Rev. Stat. § 40.230 (1988); 42 Pa. Cons. Stat. § 5944 (1982 & Supp. 1995); R.I. Gen. Laws § 5-37.3-6 (1995); S.C. Code Ann. § 44-22-90 (Law. Co-op Supp. 1994); S.D.

Codified Laws Ann. § 19-13-7 (1995) & S.D. R. Evid. 503(b); Tenn. Code Ann. § 24-1-207 (1980 & Supp. 1995); Tex. R. Civ. Evid. 510; Utah Code Ann. §§ 58-61-601 & 58-61-602 (Supp. 1995) & Utah R. Evid. 506; Vt. Stat. Ann. tit. 12, § 1612 (Supp. 1995); Va. Code Ann. § 8.01-400.2 (Michie 1992); Wash. Rev. Code Ann. § 18.83.110 (1989 & Supp. 1995); W. Va. Code § 27-3-1 (1992); Wis. Stat. Ann. § 905.04 (West 1993 & Supp. 1995); Wyo. Stat. Ann. § 33-27-123 (1995).

APPENDIX B

STATE STATUTES RECOGNIZING A SOCIAL WORKER-PATIENT PRIVILEGE

Ariz. Rev. Stat. Ann. § 32-3283 (1992); Ark. Code Ann. § 17-39-107 (Michie 1992); Cal. Evid. Code § 1010-12 (Deering 1986 & Supp. 1994); Col. Rev. Stat. Ann. § 13-90-108(1)(g) (West 1987 & Supp. 1995); Conn. Gen. Stat. Ann. § 52-146q (Supp. 1995); Del. Code Ann. tit. 24, § 3013 (1987 & Supp. 1994) & Del. R. Evid. 503; D.C. Code Ann. § 6-2001 & 2016 (1995); Fla. Stat. ch. 90.504 (1993); Ga. Code Ann. § 24-9-21 (1995); Idaho R. Evid. 518; Ill. Rev. Stat. ch. 225, para. 20/16 (1994); Ind. Code § 25-23.6-6.1 (1993); Iowa Code Ann. § 154C.5 (West 1989); Kan. Stat. Ann. § 65-6315 (1992); Ky. R. Evid. 507; La. Rev. Stat. Ann. § 37:2714 (West 1988 & Supp. 1995) & La. Code Evid. Ann. art. 510 (West 1995); Me. Rev. Stat. Ann. tit. 32, § 7005 (1988); Md. Code Ann. Cts. & Jud. Procs. § 9-121 (1995); Mass. Gen. Laws Ann. ch. 112, § 135A (West 1996); Mich. Stat. Ann. § 18.425 (1610) (Callaghan 1986 & Supp. 1995); Minn. Stat. § 595.02 (1)(g) (West 1986 & Supp. 1995); Miss. Code Ann. § 73-53-29 (1989); Mo. Rev. Stat. § 337.540 (Vernon 1989); Mont. Code Ann. § 37-22-401 (1995); Neb. Rev. Stat. § 71-1,335 (1994); Nev. Rev. Stat. § 49.252 (Michie Supp. 1993); N.J. Stat. Ann. § 45:15BB-13 (West 1995); N.M. Stat. Ann. § 61-31-24 (Michie 1993); N.Y. Civ. Prac. L. & R. 4508 (McKinney 1992); N.C. Gen. Stat. § 8-53.7-8 (1987 & Supp. 1995); N.H. Rev. Stat. Ann. § 330-A.19 (1995); Ohio Rev. Code Ann. § 2315.02(G)(1) (Baldwin 1994 & Supp. 1995); Okla. Stat. Ann. tit. 59, § 1261.1 (West 1989); Or. Rev. Stat. § 40.250 (1993) (Rule 504-4); R.I. Gen. Laws § 5-29.1-4 (1995); S.C. Code Ann. § 19-11-95 (Law. Co-op 1995); S.D. Codified Laws Ann. § 36-26-30 (1994); Tenn. Code Ann. § 63-23-107 (1990); Tex.

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No. 95-266

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

◆

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr., Deceased,

Petitioner,

—v.—

MARY LU REDMOND, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF ILLINOIS, AND THE BAZELON CENTER FOR MENTAL HEALTH LAW, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In pursuit of those goals, the ACLU has participated in numerous cases before this Court involving both privacy rights and due process, two concerns that are also implicated in this case. The ACLU of Illinois is one of its statewide affiliates.

The Bazelon Center for Mental Health Law is a Washington, D.C.-based public interest organization founded in 1972 to advocate the rights of children and adults with mental disabilities. It has brought major cases decided by this Court establishing the rights of people with mental disabilities, and it has participated as *amicus curiae* in this Court in more than a dozen additional cases.

The issue in this case is whether the federal courts should recognize a psychotherapist-patient privilege. The issue is a profoundly important one and, although framed in the context of an evidentiary dispute, implicates core constitutional values. On the one hand, any evidentiary privilege raises due process concerns by depriving the courts of the ability to consider otherwise competent evidence that in a particular case might assist the courts in arriving at a just result. On the other hand, the psychotherapist-patient relationship is one that society has long recognized as confidential precisely because it deals with intimate, personal matters that most people regard as intensely private. For that reason, moreover, there is a widespread concern that individuals in need of treatment might be deterred from seeking it if they believed that their therapeutic communications were subject to compelled disclosure.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Striking the correct balance between these competing interests is a difficult and sensitive task. *Amici* respectfully submit this brief in the hope of assisting the Court as it considers the questions of whether a psychotherapist-patient privilege exists under Rule 501 of the Federal Rules of Evidence and, assuming it does, whether it should be extended to mental health care providers other than psychiatrists and psychologists.

STATEMENT OF THE CASE

On June 27, 1991, Mary Lu Redmond, a police officer with the Village of Hoffman Estates, Illinois, responded to a report of a fight in progress at an apartment complex. When she arrived at the scene, alone, two women approached her car and advised her that there had been a stabbing inside the building. Officer Redmond testified at trial that minutes later she fired her gun and killed Ricky Allen, Sr. as he chased another man from the building and was gaining on him, was poised to stab the man with a butcher knife, and failed to heed her warnings to drop the knife.

Several of Allen's relatives witnessed the shooting and testified that Allen was not armed, that Officer Redmond had emerged from her car with her gun drawn, panicked when she saw Allen walk out of the apartment building, and shot him without warning. Officer Joe Graham, who arrived at the scene shortly after the shooting, observed a large crowd of between thirty and forty people standing on the grass and a number of people coming from the buildings. Graham testified that Officer Redmond had her gun drawn and aimed at the crowd, appeared "somewhat bewildered" and was "visibly shaken or upset or disoriented."

Allen's surviving family members (hereinafter plaintiffs) filed suit against Officer Redmond and her employer, the Village of Hoffman Estates, alleging that Officer Redmond had used deadly force in violation of Allen's rights under the Fourth and Fourteenth Amendments to the United States Constitution, and had caused Allen's death in violation of the Illinois Wrongful Death Statute.

During the course of pre-trial discovery, plaintiffs sought access to statements Officer Redmond made following the shooting to Karen Beyer, a licensed clinical social worker[2] also employed by Hoffman Estates. Officer Redmond began meeting with Beyer a few days after the shooting and continued counseling for about six months, two or three times a week. At her deposition, Redmond refused to answer questions regarding her statements to Beyer, on the basis that the communications were privileged. Plaintiffs then subpoenaed Beyer to testify at a deposition and to produce all relevant documents and records pertaining to Officer Redmond.

Respondents moved to quash, arguing that the communications and documents were a part of the counseling relationship and thus privileged. The trial judge denied the motion on the ground that the psychotherapist-patient privilege did not extend to licensed clinical social workers and, accordingly, ordered Beyer to testify as to "the disclosures made to her by Ms. Redmond of the incidents of the day that relate to" the shooting. *Jaffee v. Redmond*, 51 F.3d 1346, 1351 (7th Cir. 1995). In response to this order, Beyer appeared at a second deposition and answered questions regarding her credentials and facts Officer Redmond had shared with her about events leading up to the shooting. However, Beyer refused to produce any notes or records of her sessions with Officer Redmond.[3]

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[2] A licensed clinical social worker, under Illinois law, is a person "who (1) has a master's or doctoral degree in social work from an accredited graduate school of social work, and (2) has at least three years of supervised postmaster's clinical social work practice which shall include the provision of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders." *Jaffee v. Redmond*, 51 F.3d 1346, 1350 n.3 (7th Cir. 1995)(quoting 405 I.L.C.S. 5/1-122.1 (Ill. 1994)). Prior to becoming a licensed clinical social worker, an individual must pass an examination and have completed either (a) a master's degree in social work and 3,000 hours of satisfactory supervised clinical experience, or (b) a doctoral degree in social work and 2,000 hours of satisfactory supervised clinical experience. *Jaffee*, 51 F.3d at 1350. Karen Beyer received her master's degree in social work from Loyola University in 1969. She was certified by the state of Illinois as an employee assistance counselor, and at the time of trial, had approximately 12,000 hours of relevant experience. *Id.*

Plaintiffs then filed another motion to compel further testimony by Beyer and to produce all of her notes and reports. Once again, the trial judge ordered unrestricted and unlimited inquiry into Officer Redmond's communications with Beyer. Nevertheless, both Redmond and Beyer remained unresponsive, providing little further information, with Officer Redmond saying "I don't recall" to the majority of the questions regarding the substance of the communications. Beyer ultimately produced three pages of redacted notes.

When plaintiffs renewed their complaint, the trial judge initially ordered that Redmond would be barred from testifying at trial about her version of the shooting incident "because [plaintiffs'] attorneys have been blocked from effective cross-examination." Prior to the trial, the judge reconsidered and vacated his ruling, but made it clear the jury would be instructed it could make an adverse inference from the respondents' failure to produce Beyer's notes.[4]

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[3] Similarly, the trial court ordered Officer Redmond to appear for another deposition and to answer questions concerning her statements to Beyer. Officer Redmond appeared, but gave evasive and incomplete answers to the questions she was asked.

The jury returned a verdict in favor of plaintiffs and awarded them $45,000 for the federal constitutional claim and $500,000 for the wrongful death claim. Respondents appealed on two grounds: (1) whether the district court erred in instructing the jury on the use of deadly force; and (2) whether the district court erred in refusing to recognize a privilege under Rule 501 of the Federal Rules of Evidence for confidential communications between Officer Redmond and Beyer. The court of appeals found no error as to the first issue, but held that the district court had erred in failing to recognize a psychotherapist-patient privilege under Rule 501 of the Federal Rules of Evidence. Only the second issue is now before this Court.

SUMMARY OF ARGUMENT

Several factors support the recognition of a psychotherapist-patient privilege under Rule 501 of the Federal Rules of Evidence.[5] First, the language and history of Rule 501 leave little doubt that Congress intended the federal courts to have the authority to recognize a psychotherapist-patient privilege. Second, in the absence of clear precedent under federal law, federal courts have appropriately looked to state law for guidance. With remarkable uniformity, each of the fifty states has recognized some form of the psychotherapist-patient privilege. Third, legal and policy reasons compel recognition of the privilege under federal law. The communications at issue are at the core of any notion of personal privacy. And, as the common law has recognized with regard to other privileges for centuries, the prospect that intensely private communications may be subject to compulsory disclosure is likely to discourage at least some individuals from seeking the help they need for their mental disorders. That outcome benefits neither the individuals involved nor society at large.

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[4] Over respondents' objection, the judge did, in fact, instruct the jury that it was "entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates." 51 F.3d at 1351.

[5] Dean Wigmore believes that, in general, four factors need to be satisfied before any privilege should be recognized: (1) the communication must be one made in the belief that it will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship should be one that society considers worthy of being fostered; and (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation. *See United States v. Friedman*, 636 F.Supp. 462, 463 (S.D.N.Y. 1986)(citations omitted). Although courts considering the privilege issue tend not to address these factors specifically, the factors, especially the fourth one, resonate throughout their decisions.

Proposed Rule 504, for which Rule 501 was substituted, explicitly provided for a psychotherapist-patient privilege for confidential communications made for the purpose of treatment.[6] Although Rule 504 ultimately was not accepted by Congress, Rule 501 was enacted as a general rule of privilege providing federal courts with flexibility to recognize evidentiary privileges in light of "reason and experience." Fed.R.Evid. 501.

Here, as the court below found, both "reason and experience" strongly support recognition of a psychotherapist-privilege. In particular, the fact that every state in America has enacted legislation recognizing some version of the psychotherapist-patient privilege demonstrates a strong belief in the unique interests represented in the psychotherapist-

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[6] *See* 56 F.R.D. 183, 240-41 (1972)(setting forth the privilege).

patient relationship and the need to protect those interests, the general effectiveness of mental health services, and the social benefits derived from individuals being able to avail themselves of mental health counseling without the fear of judicially compelled disclosure of their most private concerns by their therapists. Furthermore, the legitimate expectation of privacy in a democratic society includes the notion that an individual is entitled to an inner sanctum immune from governmental intrusion. This "zone of privacy" should encompass confidential psychotherapist-patient communications. *See generally* "Developments in the Law -- Privileged Communication," 98 Harv.L.Rev. 1450, 1544-47 (1985).

Finally, if this Court decides to recognize the privilege, it should extend it beyond psychiatrists and clinical psychologists to include any mental health care provider who functions as a psychiatrist or clinical psychologist might in a particular case and who meets certain licensing or educational requirements. Rather than a mental health care provider's specific title, the touchstone should be the function of the individual providing counseling services in the context of a particular relationship. Licensed clinical social workers, for example, provide counseling services to a growing number of people, including those who cannot afford (or whose managed care plan will not pay) the fees of a psychiatrist or psychologist. In recognition of this trend, numerous states have now extended the psychotherapist-patient privilege to other mental health care providers.

ARGUMENT

I. THIS COURT CAN AND SHOULD RECOGNIZE THE EXISTENCE OF A PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER RULE 501 OF THE FEDERAL RULES OF EVIDENCE

A. The History And Language Of Rule 501 Plainly Contemplate Recognition Of A Psychotherapist-Patient Privilege

Rule 501 of the Federal Rules of Evidence was enacted as a general rule of privilege after Congress rejected a set of privilege rules which had been drafted by the Judiciary Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and the United States Supreme Court. *Trammel v. United States*, 445 U.S. 40, 47 (1980). Proposed Rule 504 would have recognized the psychotherapist-patient privilege. 56 F.R.D. 183, 240-41 (1972). Rather than nine specific rules, Congress, preferring a more flexible approach, drafted one general rule of privilege. *United States v. Gillock*, 445 U.S. 360, 367 (1980). That Rule, 501, provides in relevant part:

> [T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed.R.Evid. 501.

Both on its face and as construed, this language grants federal courts the authority to continue the evolutionary development of testimonial privileges. As this Court has noted: "In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.'" *Trammel*, 445 U.S. at 47 (citations omitted).

The Historical Note to Rule 501 supports this expansive interpretation:

> The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable in civil and criminal cases.

Notes of Committee on the Judiciary, H.R. Rep.No. 650, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7082. In developing these privileges, the uniform standard federal courts are to employ is "reason and experience." Fed.R.Evid. 501.

Furthermore, Congress anticipated future litigation over the issue of a psychotherapist-patient privilege and issued a definitive explanation of its intent in enacting Rule 501:

> Two other comments on the privilege rule should be made. The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood

> as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. Rep.No. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7059.[7]

There can be little doubt, therefore, that Congress intended for privileges to be developed on a continuing basis and that it recognized the need for specific privileges based upon confidential relationships under appropriate circumstances. *See generally* Proposed Rule 504, Advisory Committee's Note, 56 F.R.D. 183, 242 ("While the common law recognized no general physician-patient privilege, it had indicated a disposition to recognize a psychotherapist-patient privilege . . . when legislatures began moving into the field")(citations omitted).

B. The Fact That All Fifty States Recognize Some Form Of The Psychotherapist-Patient Privilege Provides Overwhelming Evidence That "Reason And Experience" Support Recognition Of The Privilege In Federal Law, As Well

Under Rule 501, the question of whether an evidentiary privilege applies in federal court is a matter of federal law in most circumstances, including the circumstances presented by this case.[8] But the fact that federal law governs does not mean that "the privilege law as developed in the states is irrelevant." *United States v. Gillock*, 445 U.S. at 365 n.8. To the contrary, state law is the most logical reference point when assessing whether "reason and experience" support recognition of a federal privilege. Thus, this Court "has taken note of state privilege law in determining whether to retain [particular privileges] in the federal system." *Id.*

Following this Court's lead, the court below looked in part to the law of privilege in Illinois, the situs of the events which gave rise to the underlying lawsuit, in holding that a psychotherapist-patient privilege exists under Rule 501. It observed that the Illinois Mental Health and Development Disabilities Confidentiality Act, 740 I.L.C.S. 110/1-110/17 (1994), expressly recognizes a psychotherapist-patient privilege.[9] 51 F.3d at 1357; *see also In re Zuniga*, 714 F.2d

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[7] Despite this language, opponents of the privilege generally construe Congress' rejection of Rule 504 as an indication that it disapproved of a psychotherapist-patient privilege. *See, e.g., United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994)(not deciding the issue in general but holding privilege does not apply in narrow context of a child sex abuse case and interpreting Congress' rejection of specific privilege rules as preserving privilege law as it existed at common law); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989)(recognizing Congress intended courts to have flexibility to develop privilege rules on a case-by-case basis, but declaring its discretion under Rule 501 to be limited to the development of the privileges extant in the common law); *accord United States v. Meagher*, 531 F.2d 752 (5th Cir. 1976)(no physician-patient privilege under the common law in federal criminal trials), and *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988)(no physician-patient or psychotherapist-patient privilege under the common law in federal criminal trials). This conclusion, however, cannot be reconciled with the legislative history cited above or this Court's approach in *Trammel*, 445 U.S. 40, as numerous other courts have recognized. *See, e.g., In Re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992)(citations omitted)("The cases rejecting the privilege are not helpful . . . because they are founded on the view that Rule 501 limits the development of privileges to those recognized by the common law, a position that we regard as contrary to the teaching of *Trammel* 'not to freeze the law of privilege'"); *accord In Re Zuniga*, 714 F.2d 632, 637 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

[8] The final sentence of Rule 501 requires application of state privilege law "with respect to an element of a claim or defense as to which State law supplies the rule of decision . . . ."

[9] "Therapist" is broadly defined under the statute. It includes any "psy-

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632, 638-39 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983) (recognizing the existence of a psychotherapist-patient privilege and noting that Michigan has one); *Sabree v. United Broth. of Carpenters & Joiners*, 126 F.R.D. 422 (D.Mass. 1989)(recognizing Massachusetts' psychotherapist-patient privilege).

The Seventh Circuit did not limit itself to Illinois law, however. In weighing the issues of "reason and experience" dictated by Rule 501, the court highlighted "the fact that all fifty states have recognized the need for and have adopted varying forms of the . . . privilege." 51 F.3d at 1356. Other courts have also found the prevalence of the privilege under state law to be persuasive. *See, e.g., In Re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992)("widespread adoption of the privilege strongly suggests that experience with it has been favorable"); *Zuniga*, 714 F.2d at 638 ("the states have demonstrated their willingness to recognize the privilege"); *see also U.S. v. D.F.*, 857 F.Supp. 1311 (E.D. Wis. 1994); *In re Grand Jury Subpoena*, 710 F.Supp. 999 (D.N.J.), *aff'd*, 879 F.2d 861 (3d Cir. 1989); *United States v. Friedman*, 636 F. Supp. 463 (S.D.N.Y. 1986); *Ziemann v. Burlington County Bridge Comm'n*, 155 F.R.D. 497 (D.N.J. 1994); *Cunningham v. Southlake Center for Mental Health, Inc.*, 125 F.R.D. 474 (N.D.Ind. 1989); *In Re Grand Jury No. 91-1*, 795 F. Supp. 1057 (D.Colo. 1992); *Siegfried v. City of Easton*, 146 F.R.D. 98 (E.D.Pa. 1992); *Sabree*, 126 F.R.D. 422; *Calloway v. Marvel Entertainment Group*, 110 F.R.D. 45 (S.D.

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[9] (...continued)
chiatrist, physician, psychologist, *social worker*, or nurse providing mental health or development disabilities services . . . ." *Jaffee*, 51 F.3d at 1357 (emphasis in original). The court stated: "Illinois law thus explicitly extends the privilege to communications with a licensed clinical social worker, like Karen Beyer." *Id.*

N.Y. 1986).[10]

C. Legal And Policy Reasons Support Recognition Of A Psychotherapist-Patient Privilege

1. Recognition Of A Psychotherapist-Patient Privilege Comports With Well-Established Notions Of A Right To Privacy

In *Whalen v. Roe*, 429 U.S. 589 (1977), this Court analyzed its prior privacy cases and concluded that,

> the cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the independence in making certain kinds of important decisions.

Id. at 599-600 (footnotes omitted).

Both interests are implicated in the present case. The sorts of communications involved in the psychotherapist-patient relationship indisputably fit within the first prong of this privacy definition. Indeed, the "disclosure of personal matters" is the essence of the therapeutic process. That process, moreover, is often directed toward assisting the patient in making important personal decisions.

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[10] Failure to recognize a federal psychotherapist-patient privilege would do more than set the federal courts at odds with the rule in all fifty states. Under the ethical rules governing the profession, a therapist is obliged to tell her patient at the outset of the relationship about "the relevant limitations on confidentiality." *See* Standard 5.01 of The Ethical Principles of Psychologists and Code of Conduct. This information would inevitably undermine the policy decision of all fifty states to protect the confidentiality of the psychotherapist-patient relationship and thereby deter people in need from seeking the therapeutic assistance they require. Failure to recognize a federal psychotherapist-patient privilege would also promote the sort of federal-state forum shopping that this Court has long sought to discourage. *Cf. Erie v. Tompkins*, 304 U.S. 64 (1938).

This is not to suggest that the decision below can only be upheld if this Court finds that the psychotherapist-patient privilege is constitutionally compelled.[11] It is to suggest that the values protected by the privilege are deeply embedded in our constitutional jurisprudence. They are also reflected in a broad array of common law principles and statutory rights. *See* "Developments in the Law," *supra* p.7, at 1544-45 (providing examples of the vast body of common law and statutes protecting an individual's interest in privacy, ranging from the tort law of invasion of privacy and defamation to the Privacy Act of 1974[12] and the Family Educational Rights and Privacy Act of 1974[13]).

It is not surprising, therefore, that many courts, including the court below, have "focused on an individual's right of privacy . . . to justify the psychotherapist-patient privilege." *Jaffee*, 51 F.3d at 1356. *See also In Re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989)(acknowledging substantial constitutional right to privacy in psychotherapist-patient communications); *In Re August, 1993 Regular Grand Jury*, 854 F.Supp. 1380 (S.D.Ind. 1994)(assuming but not deciding that a constitutional right of privacy attaches to the psychotherapist-patient relationship).

The failure to endorse a psychotherapist-patient privilege would represent a serious intrusion into the "zone of privacy," *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), that this Court, Congress, and each of the states have repeatedly recognized in analogous contexts.

2. Recognition Of A Psychotherapist-Patient Privilege Will Promote The Social Goal Of Encouraging People In Need To Seek Therapeutic Assistance

In holding that a psychotherapist-patient privilege exists under the Federal Rules of Evidence, the court below reasoned that "[t]he recognition of a psychotherapist-patient privilege can only serve to encourage troubled individuals . . . to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors." 51 F.3d at 1355. As the court explained: "Reason tells us that psychotherapists and patients share a unique relationship, in which the patient's ability to communicate freely without the fear of public disclosure is the key to successful treatment." *Id.* at 1355-56.[14]

This concern was eloquently expressed by the Advisory Committee notes to proposed Rule 504:

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[11] Although that is an interesting question, it is not a question that needs to be decided in this case. *See, e.g., In Re Lifschutz*, 467 P.2d 557, 567 (Cal.Sup.Ct. 1970)(psychotherapist-patient privilege "had deeper roots than the [state] statute and draws sustenance from our constitutional heritage").

[12] 5 U.S.C. §552a (providing guidelines for the maintenance of records on individuals by the federal government).

[13] 20 U.S.C. §1232g (protecting the privacy of student educational records).

[14] The risk of deterrence may be difficult to quantify, but it is equally difficult to ignore. It is not unreasonable to assume, for example, that the victim of a sexual assault might think twice before seeking therapy if she knew that any statements she made during therapy could be used against her at trial. Similarly, individuals undergoing the stress of divorce might hesitate before seeking treatment if they knew that their intimate disclosures could be used in divorce litigation or could be sought by the adverse spouse for use as a club in settlement negotiations.

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

Report No. 45, Group for the Advancement of Psychiatry 92 (1960), quoted in Proposed Rules, Advisory Committee Notes, 51 F.R.D. 315, 367 (1971); *accord* Slovenko, "Psychiatry and a Look at the Medical Privilege," 6 Wayne L. Rev. 175, 184 (1960)(containing extended exposition of why the privilege should exist and concluding that Wigmore's four conditions needed to justify the existence of a privilege are amply satisfied)(citations omitted).

In his treatise on evidence, Judge Weinstein has made the same point:

> Unlike the patient with physical ailments or complaints, who will likely consult a physician regardless of whether confidentiality is guaranteed, a neurotic or psychotic individual may seek help only if he is assured that his confidences will not be divulged, even in a courtroom. Thus it has been recognized that a "psychiatrist" must have his patient's confidence or he cannot help him. Even though the suppression of relevant information may result in less accurate fact finding, "the social value which effective psychiatric treatment has for the community far outweighs the potential loss of evidence."

2 WEINSTEIN'S EVIDENCE 501-18 (1992), quoted in *In Re Grand Jury No. 91-1*, 795 F.Supp. at 1059.[15]

A recent study estimates that more than fifty-two million Americans suffer from a specific diagnosable mental disorder each year. *See* Darrel A. Regier, *et al.*, "The *De Facto* U.S. Mental and Addictive Disorders Service System: Epidemiologic Catchment Area Prospective 1-Year Prevalence Rates of Disorders and Services," 50 Archives of General Psychiatry 85 (1993); *see also* Daniel Goleman, "Mental Disorders Common, But Few Get Treatment, Study Finds," N.Y. Times, March 17, 1993, at C13. This represents more than twenty eight percent of the adult population, or more than one in four.[16] Regier, *supra*, at 90. Of the fifty-two

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[15] This view is not universally shared. Those who are skeptical of a cause and effect relationship frequently cite Shuman and Weiner, "The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege," 69 N.C.L.Rev. 893 (1982). In fact, Shuman and Weiner's study does not appreciably affect the balancing of interests since it concludes that both sides of the debate have "overstated their cases." *Id.* at 927. The study itself, therefore, is less significant than the fact that Professor Shuman, an acknowledged expert in the field, has assisted in the preparation of this brief and supports recognition of a psychotherapist-patient privilege because of its impact on the right to privacy.

[16] Even this number is conservative. It includes only mental disorders

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million Americans who suffer from mental illness each year, only eight percent get help. *Id.* Studies have also shown that mental disorders respond effectively to the broad range of treatment modalities currently available. *See* "The Effectiveness of Psychotherapy," *in* HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 3, 143 (A. Bergin & S. Garfield eds., 4th ed. 1994).[17]

Courts recognizing the privilege have taken note of the prevalence of mental illness in our society and the confidential relationship between a therapist and patient essential to effective treatment. The court in *Zuniga*, for example, made the following observation:

> . . . [A] psychiatrist must have his patient's confidence or he cannot help him. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is

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[16] (...continued)
within the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS. People with "problems in living," such as marital difficulties, were not included. Regier, *supra* p.17, at 88. This study found that close to nine million of those with mental disorders develop the problem for the first time each year, while another eight million suffer from a relapse of the condition developed earlier. *Id.*

[17] *See also* James W. Pennebaker, OPENING UP: THE HEALING POWER OF CONFIDING IN OTHERS (1990)(reporting extensive research about the benefits of talking about personal difficulties and the detriment in not talking about them; *e.g.*, the inhibition of thoughts and feelings imposes stress that, over time, gradually undermines the body's defenses, affecting immune function, the actions of the heart and vascular systems, and even the biochemical workings of the brain and nervous system).

> what will be expected of them, and that they cannot get help except on that condition. * * * It would be too much to expect them to do so if they knew that all they say -- and all that the psychiatrist learns from what they say -- may be revealed to the whole world from a witness stand."

714 F.2d at 638 (quoting *Taylor v. United States*, 222 F.2d 398, 401 (D.C.Cir. 1995)(quoting Guttmacher and Weihofen, PSYCHIATRY AND THE LAW (1952). Absent a privilege, the court reasoned, a mentally ill individual may be unable to obtain the effective psychiatric treatment necessary to function in society. 714 F.2d at 639. Given these considerations, the court found that "reason and experience" warranted recognition of a psychotherapist-patient privilege. *Id.*

Similarly, the court in *Doe*, acknowledging the mandate of Rule 501 to look to "reason and experience," recognized the special relationship between a psychotherapist and patient. It observed that "it can hardly be disputed that communications between a patient and psychotherapist typically involve . . . intensely personal information." 964 F.2d at 1328. For that reason, among others, the Second Circuit concluded:

> Disclosure of communications to psychotherapists and their diagnoses would frequently be embarrassing to the point of mortification for the patient. Nor can it be seriously disputed that unrestrained disclosure might discourage persons form seeking psychiatric help. Reason thus supports recognition of the privilege.

Id. See also Clark v. Virginia Board of Examiners, 880 F.Supp. 430, 437-38 (E.D.Va. 1995).

Like Judge Weinstein and the courts in *Doe*, *Zuniga*, and *Jaffee*, *amici* believe that a psychotherapist and patient share a special and unique relationship requiring the protection of a testimonial privilege. The absence of such a privilege will be detrimental to many of the millions of individuals currently suffering from mental illnesses and will have a corresponding negative impact upon society at large. If the Court were to rule that no psychotherapist-patient privilege exists under the Federal Rules of Evidence, individuals contemplating psychotherapy will hesitate before seeking it. Those with especially personal problems may avoid seeking therapy altogether. *See generally Sabree v. United Broth. of Carpenters & Joiners*, 126 F.R.D. at 426 (court opined that, had patient known that his psychotherapist would be required to disclose his confidences about his private sexual problems, patient's trust in the psychotherapist would have been diminished and he may not have sought treatment at all). And those in therapy may avoid full disclosure with their therapists.[18]

Amici realize that the reluctance of some people with mental illness to seek a treatment is a complex phenomenon that reflects many factors, including embarrassment, the fear of public disclosure, and stigmatization.[19] But "reason and

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[18] The "fundamental" rule of psychotherapy, Freud wrote, is that the patient be totally forthcoming with the therapist. Sigmund Freud, "An Outline of Psychoanalysis," *in* 2 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 141 (1964). More broadly, self-censorship by the patient can significantly impair the therapeutic enterprise.

[19] The stigma attached to seeking mental health treatment has long been recognized. *See, e.g.*, "Report of the Task Panel on Public Attitudes and Use of Media for Promotion of Mental Health," *in* IV Task Panel Reports Submitted to the President's Commission on Mental Health 1864, 1870 (1978); Bruce J. Winick, "The Side Effects of Incompetency La-
(continued...)

experience" surely do not support a federal rule of evidence that is contrary to the rule in all fifty states and, at the very least, runs the risk of discouraging those in need from seeking therapeutic assistance.[20]

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[19] (...continued)
beling and the Implications for Mental Health Law," 1 Psychol. Pub. Pol'y & L. 6, 11 n.40 (1995).

[20] Recognition of the privilege may well involve recognition of some traditional exceptions to the privilege. In many states, for example, the privilege does not apply in child abuse proceedings, *see, e.g.*, N.Y. Family Court Act §1046(a)(vii)(1992), and confidentiality rules may be abrogated when disclosure is necessary to protect third parties from imminent danger, *e.g.*, *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal.Sup.Ct. 1976), 529 P.2d 553 (Cal.Sup.Ct. 1974). These traditional exceptions, however, are not implicated by this case, and are different than the balancing test applied by the court below. *Jaffee*, 51 F.3d at 1357 ("a case of this nature requires an assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's session outweighs that patient's privacy interests"). Because the balancing test in this case supports recognition of the privilege, as the court below found, *id.* at 1357-58, this Court need not decide the propriety of the balancing test itself. Nonetheless, it is worth noting that the vagaries of a balancing test reintroduce the very uncertainties, and thus the risk of deterring people in need from seeking therapeutic assistance, that recognition of the privilege is designed to avoid.

II. ASSUMING THAT A PSYCHOTHERAPIST-PATIENT PRIVILEGE IS RECOGNIZED UNDER RULE 501, THE PRIVILEGE SHOULD EXTEND BEYOND PSYCHIATRISTS AND CLINICAL PSYCHOLOGISTS TO ENCOMPASS ANY MENTAL HEALTH CARE PROVIDER WHO FUNCTIONS AS A PSYCHIATRIST OR CLINICAL PSYCHOLOGIST MIGHT IN A PARTICULAR CASE AND WHO MEETS CERTAIN LICENSING OR EDUCATIONAL REQUIREMENTS

The purpose of recognizing a psychotherapist-patient privilege is to preserve the psychotherapist-patient relationship. That relationship, however, is no longer limited to psychiatrists and clinical psychologists, if it ever was.[21] As the court below observed:

> Professionals with quite a variety of job titles and descriptions provide mental health care to patients. Although we have consistently referred to the privilege we recognize in this case as *the psychotherapist/patient privilege, we note that this privilege extends to other mental health care providers as well, including licensed clinical social workers.* Drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose. Indeed, social workers have been characterized as the

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[21] According to one recent study, there are approximately 30,642 psychiatrists, 56,000 psychologists, and 81,000 psychiatric social workers practicing mental health counseling today. Dial, *et al.*, "Human Resources in Mental Health," *in* MENTAL HEALTH, UNITED STATES 1990, at 196, 208 (R. Manderscheid & A. Sonnenschein eds., 1990).

> "'poor person's psychiatrist.'"

51 3d at 1358 n.19 (emphasis in original)(quoting "Developments in the Law," *supra* p.7, at 1550)(quoting Comment, "Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers," 61 Calif.L.Rev. 1050 (1973)).

Contrary to petitioner's allegations, neither respondents nor the court below nor *amici* advocate extending the privilege to "all mental health care providers." Petitioner's Brief at 37. It is appropriate to draw distinctions in order to preserve the delicate balance between society's interest in every person's testimony and its interest in preserving the privacy of confidential relationships. But that line should be drawn on the basis of function rather than title. *See* "Developments in the Law," *supra* p.7, at 1550.

Amici have no quarrel with a licensing requirement. But *amici* believe an emphasis on "function" is in full accord with the mandate of Rule 501 to make decisions regarding privileges "in light of reason and experience" and on a case-by-case basis.[22] A patient who is receiving therapy from a licensed clinical social worker has no different expectation of privacy, and should have no different right to confidentiality, than a person receiving therapy from a psychiatrist or clinical psychologist. "Developments in the Law," *supra* p.7, at 1551 ("The problems people bring to these professional counselors are often the same problems brought to psychotherapists; the need for trust and full disclosure is the same, and an identical privacy interest is involved"). Moreover, the economics of the health care marketplace and the dictates of managed care have had an undeniable impact on who provides mental health care today.

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[22] It is also consistent with the functional approach that this Court has taken to immunity questions, which looks to the "nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). *See also Buckley v. Fitzsimmons*, 509 U.S. __, 113 S.Ct. 2606 (1993); *Burns v. Reed*, 500 U.S. 478 (1991).

Other important reasons support the extension of the privilege to a broader category of mental health professionals. The fact that only eight percent of those who suffer from mental illness seek help for their problems is one such reason. Regier, *supra* p.17, at 90. Assuming some correlation between the existence of a privilege and the likelihood of potential patients seeking mental health services, limiting the category of counselors covered will serve only to reduce this already miniscule number. Extension is especially warranted given the large number of licensed clinical social workers compared to the smaller number of psychiatrists and psychologists. *See* n.21, *supra*; "Developments in the Law," *supra* p.7, at 1550 ("Social workers offer the same services as psychotherapists, and are currently providing more direct mental health service than are psychologists and psychotherapists")(citations omitted).[23]

Reflecting this changing world, numerous states have enacted legislation granting the psychotherapist-patient privilege to licensed clinical social workers and other mental health providers. *Jaffee*, 51 F.3d at 1356 n.17.[24] The fed-

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[23] Another factor supporting extension is the ever changing roles of those in the psychiatric professions: Although many psychiatrists practice psychotherapy, many others have become more engaged in prescribing and monitoring medication and have left psychotherapy to others. For the same reasons the privilege covers psychiatrists, these "others" should be covered by the privilege.

[24] *See, e.g.*, Cal.Evid. Code §1010 (West 1994)(licensed clinical social workers); C.R.S. §12-43-214 (Colo. 1995)(licensed marriage and family therapists, clinical social workers, professional counselors and, with (continued...)

eral courts are beginning to follow suit. For example, in *Zeimann v. Burlington County Bridge Comm'n*, 155 F.R.D. 497 (D.N.J. 1994), a qualified privilege was found to exist for licensed marriage counselors as an outgrowth of the psychotherapist-patient privilege. *Id. See generally Cunningham v. Southlake Center for Mental Health, Inc.*, 125 F.R.D. 474 (acknowledging that, under the right circumstances, privilege might extend to crisis intervention specialist with a master's degree in social work). A similar development has taken place in the physician-patient context, *see National Family Planning and Reproductive Health Assoc. v. Sullivan*, 1992 U.S.Dist. LEXIS 7043 (D.D.C.)(court found no rational basis to deny physician-patient privilege to nurse practitioners while providing it to physicians), *aff'd on other grounds*, 979 F.2d 227 (D.C.Cir. 1992).

In short, this Court should craft a definition of the psychotherapist-patient privilege that will be meaningful in fact as well as theory for the millions of Americans who, for a myriad of reasons, including financial need, seek therapeutic assistance from a licensed professional other than a psychiatrist or a clinical psychologist. Their rights to privacy and confidentiality are also entitled to recognition under the Federal Rules of Evidence.

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[24] (...continued)
some exceptions, certified school psychologists); 24 Del.Code Ann. §3913 (1994)(licensed clinical social workers); Fla.Stat. ch. 90.503 (1994)(licensed clinical social workers); 225 I.L.C.S. 20/16 (Ill. 1995) (licensed clinical social workers and licensed social workers); N.Y.C.P.L.R. §4508 (1992)(licensed social workers); Iowa Code §622.10 (1991) (mental health professionals); O.R.S. §40.250 (Or. 1994)(licensed clinical social workers); U.R.E. Rule 506 (Utah 1994)(mental health therapists, including someone who is or is reasonably believed by a patient to be licensed or certified as a clinical or certified social worker, marriage or family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor); Va. Code Ann. §8.01-400.2 (1994)(licensed clinical social workers); W.Va. Code §30-13-12 (1995)(clinical social workers, certified social workers, graduate social workers and social workers); W.Va. Code §30-31-13 (1991)(licensed professional counselors).

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator
for RICKY ALLEN, SR.,
Petitioner,

v.

MARY LU REDMOND and VILLAGE OF
HOFFMAN ESTATES, ILLINOIS,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF STATE SOCIAL WORK BOARDS IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator for RICKY ALLEN, SR.,

Petitioner,

v.

MARY LU REDMOND and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF STATE SOCIAL WORK BOARDS IN SUPPORT OF RESPONDENTS

I. INTRODUCTION

A. American Association of State Social Work Boards

The American Association of State Social Work Boards ("AASSWB") is a Virginia not-for-profit organization established in 1979 whose membership consists of the state boards of social work from 52 jurisdictions (50 states plus Washington D.C. and Virgin Islands).[1] AASSWB conducts the following activities with and for the benefit of these Boards in aiding such governmental agencies in the protection of public health:

> AASSWB prepares examinations at four levels (basic, intermediate, advanced, clinical) used by the various Boards to determine minimum competence as one criteria for eligibility for licensure of social workers. The examinations are used by all states, the District of Columbia and the Virgin Islands, except Michigan which does not exam candidates as part of its credentialing process.
>
> AASSWB acts as a clearinghouse for Boards in regard to gathering and disseminating final disciplinary actions against licentiates for purposes of utilization by Boards in determining eligibility for licensure by reciprocity and/or endorsement.
>
> AASSWB conducts educational seminars for Boards and their representatives from the attorneys general offices in areas that assist them to become better and more efficient state officials in carrying out their statutorily mandated duties to protect the public health.
>
> AASSWB publishes newsletters, surveys of law and other relevant social work publications to aid Boards in

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[1] For purposes of this Brief Amicus Curiae, "Boards" shall refer to the state legislatively created governmental agency empowered to license, credential and regulate the practice of social work.

understanding the process of state licensure and regulation of social workers.

Through its programs, AASSWB has lessened the burdens legislatively placed upon Boards by providing services not otherwise available nor economically feasible. AASSWB has no individual social workers as members, only Boards of social work.

All jurisdictions including the District of Columbia and Virgin Islands, license or credential social workers as a prerequisite to practice in the profession. State legislatures have created Boards to regulate the profession and, in turn, protect the public health. Generally, Boards exist either as an independent body or alternatively in an advisory capacity to an umbrella or composite department. Independent, or autonomous Boards, are generally given the power to adopt regulations designed to comply with such statutory powers to regulate the profession through the licensure, renewal of licensure and disciplinary process. Departments generally govern numerous, if not all, licensed professions within that particular state and receive recommendations from the advisory board relative to regulatory issues. A few states have a hybrid board regulating allied mental health professionals, including, for example, social workers, marriage and family therapists, substance abuse counselors, psychologists or others. Most states have supervision and/or experience requirements mandated prior to licensure to independently practice, and continuing education as a prerequisite to maintaining or renewing licensure status.

AASSWB has developed and maintains an examination program. This program consists of examinations used by Boards to determine minimum competence as one criteria in the licensure eligibility process. The examination programs are developed and maintained under principles to

support their defensibility and the reliability of scores generated therefrom. The development process follows psychometric principles and guidelines set forth by the American Psychological Association and Equal Employment Opportunity Commission, as well as others. AASSWB offers its Boards examinations at four levels (basic, intermediate, advanced, and clinical). With the exception of Michigan, all jurisdictions (including the Virgin Islands) use at least one level of the examination in the licensure or credentialing process. Numerous states use multiple examinations to license social workers at varying levels. These levels include licensed clinical social worker, licensed master social worker, licensed baccalaureate social worker and synonymous derivatives thereof. Generally, the licensed clinical social worker (sometimes referred to as an independent clinical social worker or other similar titles) has attained the highest level of education (masters or doctorate degree), supervision experience, undertaken extensive supervised experience in the profession, and has substantiated such knowledge and experience through the successful completion of the AASSWB clinical or advanced examination prior to receipt of a state license enabling the individual to engage in the independent practice of social work.

As an organization which maintains as its sole purpose the protection of the public health through the assistance to Boards, AASSWB has witnessed the recognition by state legislatures of the societal interests and benefits of licensing or credentialing social workers. This recognition has come in numerous forms including federal laws, licensure and certification statutes and the creation of Boards to oversee the licensure, renewal of licensure, continuing education, continued competency, and discipline of social workers.

B. Consent of Parties

This brief *Amicus Curiae* in support of respondents is filed with the consent of all parties.

C. Summary of Argument

AASSWB has elected to file its brief *Amicus Curiae* in this action to provide the United States Supreme Court with a national public health perspective. At stake in the issues presented to this Honorable Court is a fundamental necessity of psychotherapy, the right of the patient to counsel with a licensed clinical social worker in confidence under protections afforded by a judicially recognized privilege. The Supreme Court is presented with the opportunity to recognize the social work profession as an essential player in providing meaningful mental health care services. Such a position would be for the benefit of society, comport with state licensing and privilege laws and be commensurate with the educational and professional status achieved by social workers.

Since the time of adoption of Rule 501, social work has emerged as a leader in the role of psychotherapy. Federal legislation, state licensing laws and other related legislation (including privilege statutes), the licensure process including educational levels attained, supervision, continuing education, discipline and societal needs compel recognition of social workers as entitled to privilege protection. As providers of such mental health care services, a licensed clinical social worker-patient relationship is based upon a foundation of trust and confidence. Any concession to such confidentiality would undermine the therapeutic purpose of the relationship. Thus, as an essential participant in the provision of mental health care services, and to protect the integrity of the therapeutic process, AASSWB respectfully requests that this Honorable Court affirm the holding of the

Seventh Circuit Court of Appeals in this matter and recognize the licensed clinical social worker as entitled to a privilege under the Federal Rules of Evidence, Rule 501.

II. TERMINOLOGY

Before embarking upon the merits of the AASSWB arguments, it is essential to address terminology to be used interchangeably throughout this brief. The profession of social work covers a broad range of specialties and functions in a wide variety of settings. As social work continues to expand, its vocabulary and related definitions becomes more complex. There is considerable overlap in practice and settings both within the profession of social work and other allied mental health professions. It should be noted that clinical social workers frequently identify themselves as "psychotherapists" or "clinicians."[2] Indeed, clinical social workers and psychologists practice in closely aligned or allied fields and possess knowledge of fundamental psychological principles. As has been stated:

> We note that the field of practice engaged in by defendant here more closely resembles the practice of psychology rather than social work, as those two practices are currently defined in the Illinois revised statutes [Citations omitted]. Because of the apparent overlap in these two fields, we think the proofs may well reveal that defendant possessed or should have possessed a basic knowledge of fundamental psychological principles.

Horak v. Biris, 130 Ill. App. 3d 140, 85 Ill. Dec. 599, 474 N.E. 2d 13, 18 (Ill. App. 2 Dist. 1985). Social workers are statutorily authorized to apply knowledge and skills to "treatment procedures" defined as "individual, marital, family and group psychotherapy."[3] Accordingly, clinical social workers[4] practice psychotherapy and provide other mental health care services.

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[2] Gibelman, Margaret, *What Social Workers Do*, at XVI (National Association of Social Workers Press (1995).

III. THE EVOLUTION OF THE COMMON LAW COMMANDS RECOGNITION OF THE PSYCHOTHERAPY PRIVILEGE UNDER RULE 501

A. Federal Rule of Evidence 501

Federal Rule of Evidence 501 (Rule 501) provides that the existence and scope of evidentiary privileges are to be "governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."[5] Congress did not intend that the recognition of privileges under Rule 501 be limited to those that existed under common law at the time of the adoption of the Rule. To accept such a limited application would stagnate the law and render Rule 501 illusory. The language of Rule 501 allows the expansion or recognition of privileges by providing that the courts be governed by common law principles as they "may" be interpreted rather than as they "have been" or "were" interpreted in the past.[6]

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[3] 225 ILCS 20/3(6).

[4] Except where noted, "social worker" shall refer to clinical social worker and also may be referred to as "psychotherapist." Such terms may be used interchangeably in describing the general functions under which a clinical social worker would provide service. In general, mental health care services provide a therapeutic purpose for patients.

[5] Fed. R. Evid. 501.

[6] Baytion, Catherine M., *Note & Comment, Toward Uniform Application of a Federal Psychotherapist-Patient Privilege*, 70 Wash. L. Rev. 153, 154 (1994).

In its election not to adopt proposed Rule 504,[7]

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[7] Proposed Rule of Evidence 504 provided:

PSYCHOTHERAPIST-PATIENT PRIVILEGE

(a) Definitions.

(1) A 'patient' is a person who consults or is examined or interviewed by a psychotherapist.

(2) A 'psychotherapist' is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition including drug addition, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is 'confidential' if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(continued...)

Congress clearly demonstrated its intent under Rule 501 that privileges be determined on a case-by-case basis.[8]

Indeed, this Court stated that Rule 501 "manifested an affirmative intention not to freeze the law of privilege, [to] provide the courts with flexibility to develop rules of privilege on a case-by-case basis and to leave the door open to change." *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980).

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[7] (...continued)

(2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Proposed Rule 504, 56 F.R.D. 103, 240-41 (1973).

[8] S. Rep. No. 1277, 93d Cong., 2d Sess. 11, reprinted in 1974 U.S. Code Cong. & AD. News 7051, 7059 wherein it was stated that:

> The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of Rule 504 of the rules submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather our actions should be understood as reflecting a view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Rule 501 allows, by its very nature, for development and expansion of the privilege. Certain Appellate Circuits have improperly focused on the term "common law" as limiting the application of Rule 501. The Fourth, Fifth, Ninth and Eleventh Circuits have refused to create or recognize the psychotherapist-patient privilege because it was not part of the common law at the time of the adoption of Rule 501. *Slaken v. T.C. Porter*, 737 F. 2d 368 (4th Cir. 1984) cert. den. 470 U.S. 1035, 105 S. Ct. 1413, 84 L. Ed. 2d 796; *United States v. Meagher*, 531 F. 2d 752 (5th Cir. 1976) cert. den. 429 U.S. 853, 97 S. Ct. 146, 50 L. Ed. 2d 128; *In re Grand Jury Proceedings*, 867 F. 2d 562 (9th Cir. 1989) cert. den. 493 U.S. 906, 110 S. Ct. 265, 107 L. Ed. 2d 214; *United States v. Corona*, 849 F. 2d 652 (11th Cir. 1988) cert den. 489 U.S. 1084, 109 S. Ct. 1542, 103 L. Ed. 2d 846.

The Tenth Circuit declined to recognize the privilege but limited its decision to the psychotherapist-patient privilege in a criminal sexual abuse context and specifically left the issue open for future recognition. *United States v. Burtrum*, 17 F. 3d 1299 (10th Cir. 1994) cert. den. 63 USLW 3262, 115 S. Ct. 176, 130 L. Ed. 2d 112.

The Second and Sixth Circuits recognize the privilege in furtherance of the Congressional record and *Trammel*. *In re Doe v. Diamond*, 964 F. 2d 1325 (2nd Cir. 1992); *In re Zuniga*, 714 F. 2d 632 (6th Cir. 1983) cert. den. 464 U.S. 983, 104 S. Ct. 426, 78 L. Ed. 2d 361.

The rule and rationale articulated by the Second and Sixth Circuits and embraced by the Seventh Circuit in the present case accurately reflects the appropriate application of Rule 501.

B. Evidentiary Principles

Evidence serves multiple functions. A primary function is to facilitate the search for truth. Yet conflicting functions justify many exceptions to this general principle. The psychotherapist-patient privilege is one such exception. This privilege promotes two goals: one, to foster uninhibited relationships between psychotherapists and their patients, thus promoting the effective treatment of mental and emotional conditions. A second goal is to protect privacy.[9] Although disclosure of communications between a psychotherapist and patient could benefit society by assisting in the search for truth, the devastating effect on the treatment of mental and emotional conditions would far outweigh the benefits in many cases.[10] While the Supreme Court has acknowledged that the primary role of the court is to serve justice, the enforcement of basic moralities by courts should at times be deemed more important than the full utilization of all relevant evidence in a particular case. *Elkins v. United States*, 364 U.S. 206, 234-235, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1959). Although revelations made at counseling sessions may not be relevant, recognition by the Supreme Court of a psychotherapist-patient privilege will enforce the basic moralities and privacy issues necessary for an effective relationship.

Petitioner argues that crucial evidence will be excluded upon the recognition of a privilege. Such arguments presuppose the existence of admissible "evidence." In order for matters to be evidence they must be material, relevant, and admissible.[11] Revelations made during therapy sessions do not conform to such admissibility requirements. Quite to the contrary, most information communicated to a psychotherapist is not factual; rather it is an abstract expression of one's inner feelings and emotions. Such impressions lack accuracy, are speculative and not necessarily sincere rendering them irrelevant and immaterial.[12]

Petitioner's characterization that hypnosis is synonymous with psychotherapy (Petitioner's Brief, p. 23) is misguided and illustrates the specious nature of her arguments. Apparently, in order to disclose the "truth," Petitioner finds it necessary to equate social work practice with a completely different field and malign social workers as therapists who offer "suggestive cues" and encourage "behavioral confirmation." Petitioner has obviously overlooked the purpose of therapy under these circumstances, that is "work[ing] out the pain and anguish undoubtedly caused by Allen's death."[13]

IV. AS A LEADER IN THE ROLE OF PSYCHOTHERAPY, SOCIAL WORK IS A PROFESSION ENTITLED TO PRIVILEGE RECOGNITION UNDER RULE 501

A. What is Social Work

Petitioner throughout the course of this litigation has attempted to relegate the social worker to a rung so low on the ladder of professionals that the courts would not recognize a privilege between such social worker and patient. To the contrary, social work practice has evolved as a leading player in the role of providing psychotherapy.[14] This recognition has not only been noted through the media but has also been legislatively embraced at both the state and federal levels. Petitioners (and certain Appellate Circuits) apparently have a lack of understanding of the important job functions of social workers and the variety of fields under which they function.

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[9] *Note & Comment, Toward Uniform Application of a Federal Psychotherapist-Patient Privilege*, supra note 6, at 153.

[10] Slovenko, Ralph, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 193 (1960).

[11] Generally, Federal Rules of Evidence.

[12] Slovenko, Ralph, *Psychiatry and a Second Look at the Medical Privilege*, supra note 10, at 192.

[13] *Jaffee v. Redmond*, 51 F. 3d 1346 (7th Cir. 1995).

[14] Goleman, Daniel, *Social Workers Vault into a Leading Role in Psychotherapy*, New York Times, April 30, 1985 at C1.

Psychotherapeutic services are rendered by clinical social workers through independent private practice and mental health care facilities.[15] Practice areas include coverage of service on behalf of children, community organization, family services, corrections, group services, medical clinics, mental health, public assistance, school social work, aged, substance abuse, mental-developmental disabilities, other disabilities, occupational social work, as well as others.[16]

In Illinois, the practice of social work is defined as including:

> Social services to individuals, groups, or communities in any one or more of the fields of social case work, social group work, community organizations for social welfare, social work research, social welfare administration or social work education. Social case work and social group work may also include clinical social work, as long as it is not conducted in an independent practice.[17]

Clinical social work practice in Illinois is defined as providing:

> Mental health services for the evaluation, treatment and prevention of mental and emotional disorders in individuals, families and groups based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress.[18]

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[15] Encyclopedia of Social Work 502-512 (19th Edition 1995).

[16] Gibelman, M. & Schervish, P.H., *Who We Are: The Social Work Labor Force as Reflected in the NASW Membership*, Washington, D.C. NASW Press (1993).

[17] 225 ILCS 20/3(9).

The National Association of Social Workers model definition of the practice of social work is as follows:

> Social work practice consists of the professional application of social work values, principals, and techniques to one or more of the following ends: helping people obtain tangible services; counseling and psychotherapy with individuals, families, and groups; helping communities or groups provide or improve social and health services; and participating in legislative processes. The practice of social work requires knowledge of human development and behavior; of social, economic, and cultural institutions; and of the interaction of all these factors.[19]

As can be seen by the referenced definitions, specifically defining a diverse and complex profession can be difficult. As aptly stated by Senator Daniel Inouye (D-HI):

> The scope of social work practice is remarkably wide. Social workers practice not only in the traditional social service agency, but also: in elementary schools; in the military; in business, factories, and offices; in federal, state and local government agencies and legislative bodies; in private practice—as individuals, family and marriage therapists; in hospitals and in mental health facilities; in courts and correctional settings; in home and health care; and in services to the elderly. In fact, social workers can be found anywhere and everywhere there are people who need the help of a professional to alleviate personal or social problems.[20]

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[18] 225 ILCS 20/3(5).

[19] National Association of Social Workers, pp. 4.-5 (1973).

[20] Senator Daniel Inouye, addressing Congress "Going on Record" 1986.

The role and function of social workers is affected by both the larger environmental context in which the profession functions (the economy, social need, cultural, political preferences, and so on) and the stage of development of professional thought, leadership, direction, technology, and mission and goals.[21] As society changes, so do the services provided by social workers. Society has become more complex and negative issues have become pervasive, including crime, unemployment, single parent families, lack or quality of education, drug and alcohol abuse and the like, significantly increasing the need and demand for social work services. To illustrate, studies have shown that social workers are the dominant providers of mental health services in this country. For example, in approximately 1000 counties, one third of the counties in the country, social workers are the only licensed providers of mental health services.[22] It has been estimated that as much as 65% of all psychotherapy and mental health services are provided by social workers.[23] In 1993, only 500 medical school graduates selected a residency in psychiatry, and universities awarded fewer than 3500 doctorate degrees in psychology. During that same time period, schools of social work graduated 9000 masters degreed social workers.[24] And in 1975, the number of practicing psychiatrists (26,000) and clinical social workers (25,000) were virtually identical. At such time, there were approximately 15,000 clinical psychologists and 6000 marriage and family therapists. In 1985, ten years later, there were 60,000 clinical social workers compared to 38,000 psychiatrists, 28,000 counselors and 33,000 psychologists.[25]

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[21] Gibelman, *What Social Workers Do*, supra note 2, at 2.

[22] Goldstein, S. R., *If Past Is Prologue, Future Is Bright*, NASW News, p. 2 (July 1994).

[23] Goldstein, S. R., *Our New Challenge: Being "Insiders"*, NASW News, p. 2 (March 1993).

[24] Goldstein, S. R., *If Past is Prologue, Future is Bright*, NASW News, p. 2 (July 1994).

B. Crisis Intervention

Further recognition of social work as an important and essential participant in mental health care services is demonstrated by the participation of social workers in crisis intervention. Crisis intervention is a therapeutic process used to help clients in a crisis develop effective coping mechanisms.[26] Effective intervention can lead to an acknowledgment of the issue, recognition of its impact, and development of new behaviors for coping with similar experiences.[27] Such intervention can lead to positive growth and outlook on society.

Social workers are recognized and relied upon during crisis situations both on a smaller scale as well as national catastrophes including the 1994 U.S. Air Flight 427 accident and the 1989 United Airlines Flight 232 accident.[28] Social workers in Houston provided counseling to the families of astronauts and to NASA employees in the wake of the disaster involving the space shuttle Challenger and counseled teachers and students in Concord, New Hampshire, home of Christy McAuliffe, the school teacher who was a member of the space shuttle's crew.[29] Social workers also mobilized in the aftermath of Hurricane Hugo and Hurricane Andrew, provided mental health services in the wake of the Exxon Valdez oil spill, the 1986 U.S. Post Office shooting spree in Oklahoma, and the terrorist bombing incident in Oklahoma City at the Alfred P. Murrah Federal Building.[30]

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[25] Gibelman, *What Social Workers Do*, supra note 2, at 24.

[26] Gibelman, *What Social Workers Do*, supra note 2, at 37.

[27] Gibelman, *What Social Workers Do*, supra note 2, at 37.

[28] Gibelman, *What Social Workers Do*, supra note 2, at 37.

[29] Gibelman, *What Social Workers Do*, supra note 2, at 37.

C. Societal Benefits

One must not lose sight of the benefits to society as a whole of the effective mental health services provided by social workers. Society recognizes and dictates the disparities between what is and what should be and the need to rectify any such conditions. Society as a whole benefits from social workers rendering their professional care. Societal reliance upon social workers continues to grow based upon an ever emerging complex, technical, specialized and fragmented society which places pressure upon the individual's ability to cope with these changes.

D. Federal Recognition

Congress has also recognized social workers as important providers of social services and psychotherapy. The Omnibus Budget Reconciliation Act of 1989[31] included provisions for clinical social workers to join the limited class of mental health professionals eligible for reimbursement under Medicare. The Family and Medical Leave Act of 1993[32] includes clinical social workers as health care providers. National social welfare policies reflected in Stewart B. McKinley Homeless Assistant Act of 1987,[33] the Adoption Assistance and Child Welfare Act of 1980,[34] the Americans With Disabilities Act of 1990[35] and the Anti-Drug Abuse Act Amendments of 1988[36] further demonstrate the federal recognition of social workers as an integral part of the health care system as reflected in congressional policy.

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[30] Gibelman, *What Social Workers Do*, supra note 2, at 39-40.

[31] Pub. L. 101-239, Dec. 19, 1989.

[32] 29 U.S.C. § 2601 et seq.

[33] Pub. L. 100-77, July 22, 1987.

[34] Pub. L. 96-272, April 7, 1986.

Congressional recognition of social workers provides guidance to the Supreme Court on the federal or nationwide scale as to the importance of the profession in providing mental health services in support of governmental social policy.

E. State Recognition

All U.S. jurisdictions have adopted legislation regulating the practice of social work by providing for licensure or credentialing as a prerequisite to practice.[37] Such action by

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[35] 42 U.S.C. 12101 et seq.

[36] Pub. L. 100-690, Nov. 18, 1988.

[37] Ala. Code § 34-30-1 et seq.; Alaska Stat. § 08.95.010 et seq.; Ariz. Rev. Stat. Ann. § 32-3291 et seq.; Ark. Code Ann. § 17-39-101 et seq.; Cal. Bus. Prof. Code § 4990 et seq.; Colo. Rev. Stat. § 12-43-401 et seq.; Conn. Gen. Stat. Public Act 95-116 (effective Oct. 1, 1995); Del. Code Ann. tit. 24 § 3901 et seq.; D.C. Code Ann. § 2-3308.1 et seq.; Fla. Stat. ch. 491.002 et seq.; Ga. Code Ann. § 43-10A-1 et seq.; Haw. Rev. Stat. § 467D-1 et seq., and 467 E-1 et seq.; Idaho Code § 54-3201 et seq.; Illinois Compiled Stat. Ann. 225 ILCS 20/1 et seq.; Ind. Code § 25-23.6-1-1 et seq.; Iowa Code § 154C.1 et seq.; Kan. Stat. Ann. § 65-6301 et seq.; Ky. Rev. Stat. Ann. § 335.010 et seq.; La. Rev. Stat. Ann. § 37:2701 et seq.; Me. Rev. Stat. Ann. tit. 32 § 7001A et seq.; Md. Code Ann. Health Occup. § 19-101 et seq.; Mass. Gen. L. ch. 112 § 130 et seq.; Mich. Comp. Laws Ann. § 339.1601 et seq.; Minn. Stat. Ann. § 148B.01 et seq.; Miss. Code Ann. § 73-53-1 et seq.; Mo. Rev. Stat. § 337.600 et seq.; Mont. Code Ann. §37-22-101 et seq.; Neb. Rev. Stat. § 71-1, 295 et seq.; Nev. Rev. Stat. § 641B.020 et seq.; N.H. Rev. Stat. Ann.§ 330-A:1 et seq.;N.J. Rev. Stat. § 45:15BB-1 et seq.; N.M. Stat. Ann. §61-31-1 et seq.; N.Y. Educ. Law § 7700 et seq.; N.C. Gen. Stat. § 90B-2 et seq.; N.D. Cent. Code § 43-41-

(continued...)

state legislatures clearly indicates the recognition of social workers as qualified providers of mental health services. Not only does such recognition elevate the social worker to a professional status, it also provides the foundation on which a privilege must be recognized in order to protect the integrity of social work services.

Local regulation of social work provides consumers with the freedom to choose between qualified mental health care providers. This flexibility is crucial to certain socioeconomic classes of individuals unable to afford social services from psychiatrists or other costly providers. As has been stated, the social worker has been referred to as the "poor man's psychiatrist."[38] This freedom to select a social worker is further enhanced because costs of social work services are reimbursable by insurance companies and other third party programs.[39]

More specifically, Illinois in its Clinical Social Work Practice Act has declared the profession to impact upon the public health, safety and welfare of its citizens and is subject

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[37] (...continued)
01 et seq.; Ohio Rev. Code Ann. §4757.01 et seq.; Okla. Stat. Ann. tit. 59 § 1250 et seq.; Or. Rev. Stat. § 675.510 et seq.;Pa. Cons. Stat. Ann. 63 § 1901 et seq.; R.I. Gen. Laws 5-39.1-2 et seq.; S.C. Code Ann. § 40-63-10 et seq.;S.D. Codified Laws Ann. § 36-26-1 et seq.; Tenn. Code Ann. § 63-23-101 et seq.; Tex. Hum. Res. Code Ann. § 50.001 et seq.; Utah Code Ann. § 58-60-201 et seq.; Vt. Stat. Ann. tit. 61 § 3201 et seq.; Va. Code Ann. § 54.1-3700 et seq.; Wash. Rev. Code § 18.19.010 et seq.; W. Va. Code § 30-30-1 et seq.; Wis. Stat. § 457.01 et seq.; Wyo. Stat. § 33-38-101 et seq.

[38] *Jaffee v. Redmond*, 51 F. 3d 1346, 1357 (7th Cir. 1995) (Citing, *Developments in the Law: Part IV*, 98 Harv. L. Rev. at 1550.).

[39] Gibelman, *What Social Workers Do*, supra note 2, at 9.

to regulation in the public interest.[40] The purpose of the Illinois Clinical Social Work Practice Act is to protect and benefit the public by setting the standards of qualifications, education, training and experience for those who seek to engage in the independent practice of clinical social work and social work and to promote high standards of professional performance.[41]

The professional status of social workers has been recognized by Illinois courts which cited the practice act as indicative of the legislatures concern for the qualifications of the social worker and quality of care rendered. *Horak v. Biris*, 474 N.E.2d at 19. The Illinois practice act also emphasizes the grounds and procedures for disciplinary action including the removal of "incompetent" practitioners from the profession.[42]

Illustrative of the recognition of social work practice on an equal plane with other professions is Illinois legislation, virtually identical to social work, which declares psychology[43] and nursing[44] to impact upon the public health and, thus, like social work, require regulation. Ironically, the medical profession contains no such declaration of public policy in Illinois.[45]

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[40] 225 ILCS 20/1; Similar public policy declarations are found in the state statutes of Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Kansas, Kentucky, Louisiana, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, South Dakota, Washington and West Virginia. See supra note 37.

[41] 225 ILCS 20/1.

[42] 225 ILCS 20/19.

[43] 225 ILCS 15/1.

[44] 225 ILCS 65/2.

[45] 225 ILCS 60/1 et seq.

Even without a declaration of public policy indicating the need to protect the public through regulation, the fact that all jurisdictions within the United States, including the District of Columbia and Virgin Islands, have adopted a credentialing procedure for social workers as a prerequisite to practice indicates the professional status attained by social workers. Judicial recognition of the privilege protecting confidential social worker-patient communications should logically follow.

Furthermore, forty-eight (48) jurisdictions (including the District of Columbia and the Virgin Islands) require, in addition to the successful completion of an examination, some level of supervised practice for clinical social workers and other classifications of social workers (i.e., licensed social worker or social work technician) as a prerequisite to licensure.[46] Specifically, Illinois, in addition to requiring a doctorate degree in social work mandates 2000 hours of face to face or group supervision for an individual seeking licensure as a clinical social worker;[47] a masters degree in social work and 3000 hours of supervision for an individual seeking licensure as a clinical social worker,[48] and a bachelors degree from an accredited school and three (3) years of supervision for an individual seeking licensure as a social worker.[49] This legislative recognition of the need for supervision prior to licensure emphasizes the professional status attained by social workers.

Thirty-eight (38) states mandate continuing education as a prerequisite to licensure renewal.[50] Mandatory continuing education demonstrates the emphasis placed by the legislature upon the importance of social workers maintaining current professional standards relative to the practice.

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[46] Ala. Code § 34-30-29; Alaska Stat. § 08.95.110; Ariz. Rev. Stat. Ann. § 32-3293; Ark. Code Ann. § 17-39-306; Cal. Bus. Prof. Code § 4996.20; Colo. Rev. Stat. § 12-43-403; Conn. Gen. Stat. Chap. 383b § 20-195n; Del. Code Ann. tit. 24 § 3907; D.C. Code Ann. § 2-3308.3, and 2-3308.4; Fla. Stat. ch. 491.005; Ga. Code Ann. § 43-10A-12; Idaho Code § 54-3207; Illinois Compiled Stat. Ann. 225 ILCS 20/9; Ind. Code § 25-23.6-5-2; Kan. Stat. Ann. § 65-6306; Ky. Rev. Stat. Ann. § 335.100; La. Rev. Stat. Ann. § 37:2706; Me. Rev. Stat. Ann. tit. 32 § 7053; Md. Code Ann. Health Occup. § 19-302; Mass. Gen. L. ch. 112 § 131; Mich. Comp. Laws Ann. § 339.1604; Minn. Stat. Ann. § 148B.21; Miss. Code Ann. § 73-53-13; Mo. Rev. Stat. § 337.615; Mont. Code Ann. §37-22-301; Neb. Rev. Stat. § 71-1, 314; Nev. Rev. Stat. § 641B.230 and 641B.240; N.H. Rev. Stat. Ann.§ 330-A:16-d; N.J. Rev. Stat. § 45:15BB-6; N.M. Stat. Ann. §61-31-9; N.C. Gen. Stat. § 90B-7; N.D. Cent. Code § 43-41-05; Ohio Rev. Code Ann. §4757.09; Okla. Stat. Ann. Tit. 59 § 1261.1; Or. Rev. Stat. § 675.530; R.I. Gen. Laws 5-39.1-8; S.C. Code Ann. § 40-63-70; S.D. Codified Laws Ann. § 36-26-17; Tenn. Code Ann. § 63-23-104; Tex. Hum. Res. Code Ann. § 50.024; Utah Code Ann. § 58-60-205; Vt. Stat. Ann. tit. 61 § 3205; Va. Code Ann. § 54.1-2400; Wash. Rev. Code

(continued...)

[46] (...continued)

§ 18.19.110; W. Va. Code § 30-30-5; Wis. Stat. Ann. § 457.08; Wyo. Stat. § 33-38-106.

[47] 225 ILCS 20/9(3)(b).

[48] 225 ILCS 20/9(3)(a).

[49] 225 ILCS 20/9A.

[50] E.g. Ala. Code § 34-30-26; Alaska Stat. § 08.95.040; Ariz. Rev. Stat. Ann. § 32-3273; Ark. Code Ann. § 17-39-203; Del. Code Ann. tit. 24 § 3912; D.C. Code Ann. § 2-3305.10; Fla. Stat. ch. 491.007; Ga. Code Ann. § 43-10A-16; Illinois Compiled Stat. Ann. 225 ILCS 20/11; Iowa Code § 154C.4; Kan. Stat. Ann. § 65-6313; La. Rev. Stat. Ann. § 37:2710; Me. Rev. Stat. Ann. tit. 32 § 7060; Md. Code Ann. Health Occup. § 19-308; Mass. Gen. L. ch. 112 § 136; Minn. Stat. Ann. § 148B.22; Miss. Reg. Chp. 11 § 11-13; Mo. Rev. Stat. § 337.627; Mont. Code Ann. §37-22-304; Neb. Rev. Stat. § 71-1, 315; Nev. Rev. Stat. § 641B.280, 641B.240; N.H. Rev. Stat. Ann.§ 330-A:8; N.M. Stat. Ann. §61-31-14; N.C. Gen. Stat. § 90B-9; N.D. Cent. Code § 43-41-12; Ohio Rev. Code Ann. §4757.11; Okla. Stat. 59 § 1261.1; Or. Rev. Stat. § 675.560; R.I. Gen. Laws 5-39.1-7; S.C. Code Ann. § 40-63-80; S.D. Codified Laws Ann. § 36-26-26; Tenn. Code Ann. § 63-23-103; Tex. Hum. Res. Code Ann. § 50.034; W. Va. Code § 30-30-10; Wyo. Stat. § 33-38-107.

While technically in existence for many years, the recognition of social work as a profession represents a relatively recent phenomenon. All states presently require credentialing prior to practicing as a social worker, but thirty (30) states have adopted practice acts relative to credentialing since 1979.[51] While social work may not have been the beneficiary of analysis through previous judicial decisions relative to privilege and/or privacy issues, the status placed upon the profession by state legislatures through the practice acts places social work communications within the parameters of Rule 501.

Based upon the definition of the practice, the growth of the profession, the recognition by state legislatures for the need of regulation along with the flexibility placed in the judiciary by Congress in adopting Rule 501, communications between social workers and patients should be recognized as privileged under Rule 501.

F. A Vast Majority of States Recognize a Statutory Privilege for Confidential Communications Between a Clinical Social Worker and Patient

The fact that all states have statutorily recognized some form of the psychotherapist-patient privilege of confidential

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[51] 1980 Tennessee; 1981 Florida; Texas; 1983 Montana; New Hampshire; North Carolina; North Dakota; Virgin Islands; 1984 Georgia; Iowa; Ohio; West Virginia; 1985 Connecticut; 1986 District of Columbia; Nebraska; Vermont; Wyoming; 1987 Minnesota; Mississippi; Nevada; Pennsylvania; Washington; 1988 Alaska; Arizona; 1989 Hawaii; Missouri; New Mexico; 1990 Indiana; 1991 New Jersey; 1992 Wisconsin; see *supra* note 37.

communications[52] is further indicative of the state recognition of the profession and the importance of confidential communications between a social worker and patient. Currently, forty-five (45) states have included social workers within such protections.[53] Such legislative recognition provides this Court with guidance from the states in its analysis of the application of Rule 501. As appropriately stated by the Seventh Circuit, "This widespread recognition of the psychotherapist-patient privilege in all fifty states is strong evidence that 'experience with [the privilege] has been favorable.' " *Jaffee v. Redmond*, 51 F. 3d 1346, 1357 (7th Cir. 1995).

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[52] *Developments in the Law Part IV*, 98 Harv. L. Rev. at 1539 (noting 45 states enacted statutes as of 1985) since then see; Alaska Stat. §08.86.200 (1994); Iowa Code §622.10 (1993); Neb. Rev. Stat. §27-504 (1994); S.C. Code Ann. §44-22-90 (Law. Co-op 1993); W. Va. Code §27-3-1 (1994).

[53] Ariz. Rev. Stat. Ann. §32-32-83; Ark. Code Ann. §17-39-107; Cal. Evid. Code §1012; Colo. Rev. Stat. §13-90-107; Conn. Gen. Stat. Ann. 552-146q; Del. Code Ann. tit. 24, §3913; D.C. Code Ann. §14-307; Fla. Stat. ch. §90-503; Ga. Code Ann. §24-9-21; Idaho Code §54.3213; Illinois Compiled Stat. Ann. 225 ILCS 20/16, 740 ILCS 110/10; Ind. Code Ann. §25-23.6-6-1; Iowa Code Ann. §622.10; Kan. Stat. Ann. §65-6315; Ky. R. Evid., Rule 507; La. Code Evid. Art. 510; Me. Rev. Stat. Ann. tit. §7005; Md. Code Ann., Cts. & Jud. Proc. §9-121; Mass. Gen. Laws C-112 §135B; Mich. Comp. Laws Ann. §339.1610; Minn. Stat. Ann. §595.02(g); Miss. Code Ann. 73-30-17 §73-53-29; Mo. Rev. Stat. 337.540, §337.636; Mont. Code Ann. §37-22-401; Neb. Rev. Stat. §71-1,335; Nev. Rev. Stat. Ann. §49.215-254; N.H. Rev. Stat. Ann. §330-A:19; N.J. Stat. Ann. §45:15BB-13; N.M. Stat. Ann. §61-31-24; N.Y. Civ. Prac. L. & R. §4508; N.C. Gen. Stat. §8-53.7; Ohio Rev. Code Ann. §2317.02(G); Okla. Stat. Ann. tit. 59 §1261; Or. Rev. Stat. §40.250, Rule 504-4; R.I. Gen. Laws 5-39-1-4; S.C. Code Ann. 44-22-90; S.D. Codified Laws Ann. §36-26-30; Tenn. Code Ann. §63-23-107; Tex. R. Civ. Evid. Rule 510; Utah Code Ann. §58-60-144, Utah R. Evid. 506; Vt. R. Evid. 503; Va. Code Ann. §8.01-400.2; Wash. Rev. Code §18.19-180; W. Va. Code §30-30-12; Wis. Stat. Ann. §905.04; Wyo. Stat. §33-38-109.

In analyzing the application of Rule 501 to the current circumstances, the Supreme Court may take note of the relevant state privilege laws in determining whether to retain, or recognize, them in the federal system. *United States v. Gillock*, 445 U.S. 360, 369 n.8, 100 S.Ct. 1185, 63 L.Ed. 2d 455 (1980). An overwhelming endorsement through the enactment by all jurisdictions of privilege laws provides the necessary backdrop for federal recognition of the privilege. Based upon the wisdom of the state legislatures, and the strong policy of comity between state and federal sovereignties, *William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982), recognition of the privilege is mandated in light of reason and experience.

V. EFFECTIVE PSYCHOTHERAPY IS BASED UPON A FOUNDATION OF TRUST AND CONFIDENCE AND CONCESSIONS TO SUCH CONFIDENTIALITY WOULD UNDERMINE THERAPEUTIC EFFECTIVENESS

A. Psychotherapy is Based Upon Trust and Confidence

The relationship between a psychotherapist and patient is based upon trust obtained through confidential communications. The very essence of psychotherapy is confidential, personal revelations of matters about which the patient is normally reluctant to reveal or discuss.[54] Generally, psychotherapy analysis involves a process which explores the most hidden aspects of personality, disclosing matters theretofore

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[54] Guttmacher, M. & H. Weinhofen, *Psychiatry and the Law 269-87* (1952); Slovenko, Ralph, *Psychotherapy, Confidentiality, and Privileged Communication 37-50* (1966); Group for the Advancement of Psychiatry, Rep. No. 45, at 92 (1960); Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 Wayne L. Rev. 609 (1964).

unknown, perhaps, even to the conscious mind of the patient. In order to express such innermost thoughts, the patient must feel the utmost honesty and trustworthiness of the psychotherapist. As has been stated, the etymology of the word "person" is illustrative of the description of psychotherapeutic revelations:

> The word stems from the Latin "persona," meaning the character of a novel or play. Persona is the public personality, those aspects which one displays to the world as contrasted with the private personality which exists behind the social facade. It is the mask which is worn by an individual in response to the demands of social convention and tradition. The mask is what we daily see; it conceals the inner nature and conflicts of the individual. Hopefully, in psychotherapy, the mask is removed.[55]

Psychotherapists encourage patients to reveal thoughts without regard to the usual social amenities. It is without question that patients lower their defenses and reveal personal inner thoughts with the expectation of strict confidence. Such confidentiality is necessary for meaningful communication, proper diagnosis and effective therapeutic treatment.[56] Because of the unique character of psychotherapy, a psychotherapist cannot successfully treat a patient unless he or she can assure the patient of complete confidentiality.

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[55] Slovenko, *Psychotherapy, Confidentiality, and Privileged Communication 40* (1966).

[56] *See e.g.*, Proposed Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 242 (1972) (proposed rule 504 advisory committee note) ("there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment") (quoting Report No. 45, Group for the Advancement of Psychiatry 92 (1960); Baytion, Catherine M., Note & Comment, Toward Uniform Application of a Federal Psychotherapist-Patient Privilege, 70 Wash. L. Rev. 153, 157 (1995) ("successful treatment of mental and emotional conditions depends upon confidentiality because treatment often requires patients to reveal socially unacceptable

(continued...)

Evidence relative to psychotherapy sessions must be maintained in confidence and not revealed to those outside the professional relationship, including in judicial proceedings (with various exceptions), for even a single concession to secrecy would undermine the whole purpose of therapy which is to build a trusting relationship.[57] As has been stated, "patient-centered psychotherapy" develops a:

> Contractual agreement between the therapist and the patient to engage in a two-person enterprise. This arrangement provides the essential condition for a unique emotional experience. As a result of what the patient is enabled to learn about himself under this special circumstance, he may be able to alter his behavior. The ultimate decision to change . . . however, rests with him and not with the therapist. Since confi-

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[56] (...continued)
thoughts and feelings") (citing Sidney Jourard, Some Psychological Aspects of Privacy, 31 Law & Contemp. Probs. 307, 311 (1966); Keith Levick, Privilege Communication: Does it Really Exist?, 62 Soc. Casework, No. 4, at 235, 236 (April, 1981) (therapists "need to protect the delicate relationship between themselves and their clients in order to maintain the full trust and confidence necessary for successful therapeutic relationships"; "[p]sychotherapy, by its very nature[,] is worthless unless the patient feels assured from the onset that whatever he may say will be forever kept confidential) (quoting Judge Luther Alverson, Atlanta Supreme Court, Address to the North Georgia Chapter of the national Association of Social Workers, Atlanta, Georgia (October 21, 1958)).

[57] Dubbelday, Catharina J.H., *Comment, The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved,* 34 Emory L.J. 777, 795-800 (1985).

> dentiality is a sine qua non of patient-oriented therapy, its very existence depends on the protection of privileged communication.[58]

Thus, confidentiality and the recognition of a privilege between the social worker and patient is a technical necessity for effective therapy or counseling to ensue.

Commentators have observed that the patient must be able to discuss his fears and anxieties with the psychotherapist without concern that his innermost thoughts, feelings and troubles will not be disclosed to the public at large.[59] Successful treatment rests upon assurances of complete confidentiality.[60] Thus, the psychotherapist-patient privilege should be recognized in light of reason and experience.

The judiciary has also observed the essential character of confidential communications between a psychotherapist and patient. As stated:

> Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Thera-

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[58] Dubey, Joseph, M.D., *Confidentiality as a Requirement of the Therapist: Technical Necessities for Absolute Privilege in Psychotherapy.* Am. J. Psychiatry 131 (10 October 1974).

[59] Dubbelday, Catharine J.H., *Comment, The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved,* 34 Emory L.J. 777, 799 (1985) (Quoting A. Anastasi, *Fields of Applied Psychology* 346-47 (1979)).

[60] Soffin, Ellen S., *Note, The Case for a Federal Psychotherapist-Patient Privilege That Protects Patient Identity*, 1985 Duke L.J. 1217, 1221.

> peutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

In re Zuniga, 714 F.2d 632, 637 (6th Cir. 1983).

B. Exceptions Do Not Eviscerate the Need for a Privilege

All privileges require exceptions under certain circumstances. *In the Matter of DDS*, 869 P.2d 160, 163, n. 4 (Alaska 1994). The existence of exceptions does not eliminate the need to recognize a privilege in the first place. Petitioner argues that the existence of exceptions under state laws somehow transforms the confidential relationship into one not in need of protection. However, Petitioner's basis for arriving at this conclusion is predicated upon references to cases with no similarities to the current circumstances. Matters involving criminal charges, child abuse and the like may be viable exceptions to a recognized privilege. However, this does not overcome the need for an initial recognition of the privilege.

VI. CONCLUSION

AASSWB, for the reasons stated herein, respectfully requests this Honorable Court affirm the decision of the Seventh Circuit Court of Appeals recognizing a privilege protecting confidential communications between a clinical social worker and patient under Rule 501.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1995

CARRIE JAFFEE, As Special Administrator for
Ricky Allen, Sr., Deceased,
Petitioner,
v.
MARY LU REDMOND AND THE VILLAGE OF
HOFFMAN ESTATES, ILLINOIS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE EMPLOYEE ASSISTANCE PROFESSIONALS ASSOCIATION, INC., IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

With the consent of the parties, the Employee Assistance Professionals Association, Inc., (EAPA) respectfully submits this brief *amicus curiae* in support of Respondents.[1] EAPA, founded in 1971, is the largest and oldest professional organization for employee assistance (EA) professionals in the United States. EA professionals are hired by employers to aid in the prevention and resolution of problems affecting employee productivity and well-being. These problems may arise from a number of sources, among them mental or emotional conditions, including substance abuse, that may require psychotherapeutic treatment. Employee assistance programs (EAPs) are widely established, and are used by over 17,000 employers nationwide. EAPs are in place in workplaces that employ 45% of American workers. The profession is gaining legal recognition as well, under both federal and state law.[2]

EA professionals working in EAPs do not in their capacity as EA professionals diagnose or treat mental illness, although many of them are also licensed psychotherapists who may in that capacity provide diagnostic and therapeutic services. Because EA professionals acting in that capacity do not diagnose or treat mental illness, they will not be directly affected by the outcome of the instant case, and EAPA makes no argument that EA professionals acting in that capacity are independently entitled to the psychotherapist-patient privilege at issue here. Nonetheless, EAPA has at least two distinct interests in this litigation.

First, those members of EAPA who are also psychiatrists, psychologists and licensed clinical social workers may in those capacities be affected by the outcome of this case.

Second, EA professionals play an essential role in the workplace in identifying problems that may interfere with job performance and well-being, in encouraging troubled employees to seek appropriate psychotherapeutic treatment, and in referring them for such treatment. Indeed, in some workplaces employees are required by their health insurers to see an EA professional for assessment and referral before they may seek treatment by a licensed psychotherapist. The psychotherapist-patient privilege therefore may in some circumstances be relevant to EA professionals in their problem identification and referral capacity. Cf., *e.g.*, 25 C. Wright & K. Graham, *Federal Practice and Procedure* § 5531, p. 237 (1989) (Wright & Graham) (discussing application of physician-patient privilege to communications with non-physician members of the health care delivery team that are functionally related to diagnosis and treatment).

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[1] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

[2] See, *e.g.*, 49 C.F.R. § 219.5 (federal Department of Transportation safety regulations); 48 C.F.R. § 23.504 (federal Drug-Free Workplace regulations); Tenn. Code Ann. § 62-42-101, *et seq.* (Supp. 1995) (state licensure).

SUMMARY OF ARGUMENT

I. This case requires this Court to decide whether to recognize a privilege under Federal Rule of Evidence 501 for confidential communications between a patient and her psychotherapist. The case for recognizing the privilege is compelling.

Congress has given this Court the responsibility to develop an evolving federal law of privilege "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." Fed. Rule of Evid. 501. In determining whether to recognize a psychotherapist-patient privilege, this Court must interpret in light of reason and experience the common-law principle that a privilege for confidential communications should be recognized if it promotes a public good more important than the need for the evidence it will exclude. See, *e.g.*,*Trammel* v. *United States*, 445 U.S. 40, 50-51 (1980). In assessing a claim of privilege under Rule 501, this Court should look first to the interests that may justify the claimed privilege, and then to the current state of the law and of legal thought concerning it.

This Court has described two interests that may justify a privilege for confidential communications, and each is independently sufficient to support recognition of the psychotherapist-patient privilege. First is the utilitarian interest in encouraging individuals to make disclosures in certain settings because those disclosures are necessary to the proper performance of a function that society values. There could hardly be a more

valuable function than the diagnosis and treatment of mental and emotional disorders. In this case, confidentiality is necessary both to ensure that such diagnosis and treatment is sought by those who need it, and to ensure that that treatment may be effective.

Second is the inherent moral and ethical interest in preserving confidentiality in certain settings. In this case, protection of the privacy of communications between patient and psychotherapist in the course of diagnosis and treatment is required as a matter of intrinsic decency. Indeed, the precepts of civilized society require recognition of the sanctity of the highly personal communications made in confidence between a patient and his or her psychotherapist.

The inquiry into the state of the law, too, strongly supports recognition of the psychotherapist-patient privilege. Not only have expert bodies and legal scholars overwhelmingly concluded that recognition of the privilege is appropriate, but the privilege has been recognized by all fifty States.

II. The psychotherapist-patient privilege should also be recognized because failure to recognize it would unnecessarily render the privilege for communications between an individual and his or her clergyperson susceptible to Establishment Clause challenge. Although the instant case does not present the question whether or to what extent the psychotherapist-patient privilege is itself constitutionally required, the Court can and should consider the impact its decision will have beyond the context of this case in light of the constitutional command of neutrality toward religion.

III. This Court need not define the precise contours of the privilege in this case. Indeed, to act in such a legislative fashion would be inappropriate under the method mandated by Rule 501. However in addressing Petitioner's suggestion that the psychotherapist-patient privilege should not be applied on the particular facts of this case, this Court should make clear that any countervailing concerns about particular applications of the privilege should be addressed through categorical exceptions rather than through application of an *ad hoc* balancing test in each case in which the privilege is invoked. The Court has recognized that this is the appropriate approach in previous cases applying the law of privilege under Rule 501, and only such a categorical approach will provide patients *ex ante* with the certainty necessary for the privilege to serve its utilitarian function.

IV. Finally, because the propriety of the privilege turns on the function of diagnosing and treating mental or emotional conditions, it logically should apply to all who are licensed or certified by law to perform that function, including licensed clinical social workers. In addition, an arbitrary limitation of the privilege to a fixed subcategory of licensed psychotherapists that includes only psychiatrists and psychologists could dramatically reduce the availability of psychotherapeutic services, and could lead to a substantial increase nationally in the cost of mental health care services. Particularly at a time of enormous pressure to reduce the costs of quality health care, this Court should take care not to disrupt the market for health care services, an area of traditional state regulation, in the absence of a clear legal imperative.

ARGUMENT

I. THIS COURT SHOULD RECOGNIZE A PSYCHOTHERAPIST-PATIENT PRIVILEGE FOR COMMUNICATIONS BETWEEN A PATIENT AND A LICENSED OR CERTIFIED PSYCHOTHERAPIST ENGAGED IN THE DIAGNOSIS OR TREATMENT OF A MENTAL OR EMOTIONAL CONDITION

This Court should recognize a psychotherapist-patient privilege for communications made by a patient in confidence to a psychotherapist who is licensed or certified by law to engage in the diagnosis or treatment of mental or emotional conditions, including substance abuse. This privilege should apply only to communications made for purposes of diagnosis or treatment and "should cover [information communicated by] non-verbal acts of the patient as well as more traditional modes of communication." 25 Wright & Graham § 5530, p. 210. Such a privilege has perhaps the strongest claim to recognition of any evidentiary privilege unknown at common law.

A. Congress Has Delegated to the Courts the Responsibility to Develop the Law of Privilege Under the Method of the Common Law

Congress has delegated to the federal courts, and thus, ultimately, to this Court, the responsibility to "develo[p a] federal common law of evidentiary privileges." *United States* v. *Zolin*, 491 U. S. 554, 574 (1989). Federal Rule of Evidence 501 provides that in cases like the instant one in which the rule of decision as to all claims and defenses is provided by federal law:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed. Rule Evid. 501.[3]

It was Congress's intent in adopting Rule 501 that the law of privilege not be frozen in time. *Trammel* v. *United States*, 445 U. S. 40, 47 (1980). Rule 501 provides this Court with a mandate "to continue the evolutionary development of testimonial privileges." *Id.* The Rule was adopted in 1975 after Congress rejected the Proposed Federal Rules of Evidence (Proposed Rules) pertaining to privilege drafted by the Judicial Conference Advisory Committee on Rules of Evidence (Advisory Committee), and approved by the Judicial Conference of the United States and by this Court. See *id.* The Proposed Rules would have wiped out the pre-existing law of privilege and would have granted recognition only to nine distinct categories of privileged information. See 56

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[3] The Rule goes on to provide, in language not applicable here, that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."

F.R.D. 183, 234-258 (1973) (Proposed Rules 502-510). Congress rejected the static approach taken by the Proposed Rules, and instead adopted Rule 501, which was intended to "leav[e] the law in its current condition to be developed by the courts of the United States utilizing the principles of the common law," S. Rep. No. 93-1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7053. See *Trammel*, 445 U. S. at 47.[4]

By adopting Rule 501, Congress has thus delegated to the federal courts the responsibility to develop the federal law of privilege in light of new and changing circumstances. In applying the Rule, this Court has in appropriate circumstances both expanded and contracted the scope of previously-recognized evidentiary privileges. In *Upjohn Co.* v. *United States*, 449 U. S. 383 (1981), for example, the Court expanded the attorney-client privilege beyond what was covered at common law to apply to communications by employees of a corporation with that corporation's counsel. *Id.* at 389-397. In *Trammel* v. *United States,* by contrast, the Court narrowed the privilege recognized at common law against adverse spousal testimony, so that it could be invoked only by the "witness-spouse." 445 U. S. at 53.

In a changing world, this Court's power is not limited to applying only those privileges recognized at common-law. Indeed, in applying the language codified in Rule 501 this Court has also, contrary to Petitioner's assertion, Petitioner's Brief (Pet. Br.) 14, recognized at least one category of privilege that, like the psychotherapist-patient privilege, was not known at common law. In *Wolfle* v. *United States*, 291 U. S. 7 (1934) — the very case in which the language now codified in Rule 501 originated, *id.* at 12 — the Court recognized a privilege for confidential communications between husband and wife that was not recognized at common law. *Id.* at 14; accord *Trammel*, 445 U. S. at 51 and n.5 (leaving undisturbed *Wolfle*'s "independent rule protecting

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[4] It is also clear that Congress rejected the Proposed Rules in large part because they made no provision for the application of the state law of privilege in diversity cases. See, *e.g.*, 23 Wright & Graham § 5421, pp. 648-666 (1980) (describing the controversy over the Proposed Rules).

confidential marital communications").[5] Similarly, those federal Courts of Appeals that have addressed the issue have recognized a federal privilege for confidential communications to members of the clergy,[6] despite the fact that no such privilege was recognized at common law.[7] This Court, too, has described that privilege with approval. See *Trammel*, 445 U. S. at 51 (dictum).

Under Rule 501, then, "[t]he courts must continue to develop recognized privileges, as well as to formulate new privileges, on a case-by-case basis." 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 501[03], p. 501-37 to 501-39 (1989) (Weinstein & Berger) (footnotes omitted). This is not to say that the Court should act without careful consideration. Since every privilege conflicts with "the fundamental principle that the public . . . has a right to every man's evidence," privilege should not cavalierly be recognized. *Trammel*, 445 U. S. at 50 (citation and internal quotation marks omitted). But where "reason and experience" indicate that an evidentiary privilege is warranted, Rule 501 requires this Court to recognize it.

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[5] Although some courts have acted on the belief that marital communication was privileged at common law, see J. Strong, *McCormick on Evidence* § 79, p.113 (4th ed. 1992), the historical evidence does not support this conclusion. See *Shenton* v. *Tyler*, [1939] Ch. 620, 635 (concluding after exhaustive inquiry that "the alleged common law rule of privilege protecting marital communications as such never existed"); 8 J. Wigmore, *Evidence* § 2333, pp. 644-645 (McNaughton rev. 1961) (Wigmore) (privilege recognized in England only in the 1850s; in the United States, privilege adopted in most States by legislation). *Trammel* addressed the distinct common-law rule that disqualified one from testifying either for or against one's spouse in any case in which he or she was a party. This rule applied whether or not the testimony concerned confidential communication. See, *e.g.*, *Trammel*, 445 U. S. at 43-44.

[6] See *In Re Grand Jury Investigation*, 918 F. 2d 374, 378-385 (CA3 1990); *United States* v. *Dubé*, 820 F. 2d 886, 889-890 (CA7 1987) (dictum); *United States* v. *Luther*, 481 F. 2d 429, 433 (CA9 1973) (dictum); *United States* v. *Wells*, 446 F. 2d 2, 4 (CA2 1971) (dictum); *Mullen* v. *United States*, 263 F. 2d 275, 277-280 (CADC 1959) (Fahy, J., joined by Edgerton, J.).

[7] See 8 Wigmore § 2394, p. 869.

B. Every Factor Appropriately Considered by This Court Counsels in Favor of Recognizing the Privilege

The Court's role in this case is to interpret in light of reason and experience the common-law principle that a privilege for confidential communications should be recognized when its benefit in terms of the promotion of important interests is judged to outweigh its cost in terms of the loss of probative evidence. See *University of Pennsylvania* v. *E.E.O.C.*, 493 U. S. 182, 189 (1990); *Trammel*, 445 U. S. at 50-51. Assessment of the interests that would be served by the asserted privilege should be the first avenue of the Court's inquiry. Cf., *e.g.*, *Zolin*, 491 U. S. at 569; *Trammel*, 445 U. S. at 50-53. The second should be the state of the law and of legal thought concerning the asserted privilege. Cf., *e.g.*, *Zolin*, 491 U. S. at 570; *Trammel*, 445 U. S. at 48-50.

In describing the law of privilege, this Court has recognized two distinct interests that may justify an evidentiary privilege for confidential communications. See *Trammel*, 445 U. S. at 51. These two interests are also widely described in the literature. See, *e.g.*, J. Strong, *McCormick on Evidence* § 86, pp. 118-119 (4th ed. 1992) (McCormick); 23 Wright & Graham § 5422, pp. 670-671 (1980); *Developments in the Law — Privileged Communications*, 98 Harv. L. Rev. 1450, 1471-1486 (1985). The first is the utilitarian interest in encouraging the individual to speak candidly in a particular confidential setting. The second is the inherent ethical and moral interest in preventing inquiry into the contents of confidential communications made within a particular relationship.

The Court's opinion in *Trammel*, its first to construe Rule 501 after its enactment, illustrates these two interests. The Court described the attorney-client privilege in terms of the first justification: The "lawyer client-privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." 445 U. S. at 51. The Court articulated the same type of justification for the physician-patient privilege. *Id.*[8] By contrast, in describing the justification for the privilege for confidential communications with a member of the clergy, the Court did not focus on the necessity of confidentiality for the achievement of some valuable clerical purpose, but on the human need of the individual communicant for confidence in that setting: "The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." *Id.*

With respect to many widely-recognized privileges for confidential communication these justifications are two sides of a coin. Society has an instrumental interest *ex ante* in encouraging the communications at issue. It also has a moral and ethical interest *ex post* in ensuring both that the contents of those communications remain private and that those who receive such confidential communications not be forced to breach the trust placed in them.

In addition to examining the interests served by the asserted privilege, this Court has been particularly sensitive to the state of the law when articulating the law of privilege. See, *e.g. Zolin*, 491 U. S. at 570; *Trammel*, 445 U. S. at 48-50. This Court has followed "the characteristic principle of the common law to draw its inspiration from every fountain of justice," *Hurtado* v. *California*, 110 U. S. 516, 531 (1884). Thus, in exercising its responsibility to explicate "the developing federal common law of evidentiary privileges," *Zolin*, 491 U. S. at 574, the Court has not only reasoned by analogy to existing law, see, *e.g.*, *Upjohn*, 449 U. S. at 389-396, but has also looked for guidance to a variety of outside sources, including developments in state legislation, see, *e.g.*, *Trammel*, 445 U. S. at 48; *Funk* v. *United States*, 290 U. S. 371, 380 (1933), the recommendations of expert bodies, *Zolin*, 491 U. S. at 570; *Trammel*, 445 U. S. at 48-49, and scholarly opinion, *Zolin*, 491 U. S. at 569-570; *Trammel*, 445 U. S. at 50.

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[8] The physician-patient privilege was not recognized at common law. Since its first legislative recognition by New York in 1828 it has been adopted in some form in about three-fourths of the States. See 2 Weinstein & Berger ¶ 504[01], p. 504-9.

1. A Privilege for Communications Between a Patient and His or Her Psychotherapist is Justified on Utilitarian Grounds

Again, the first rationale for recognition of privilege is the utilitarian one, aimed at encouraging the disclosures that would be protected by the privilege. According to Wigmore this is the primary rationale for recognition of a privilege for confidential communication that can be deduced from the cases decided at common law. In Wigmore's classic articulation of this utilitarian rationale he said:

> Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception, four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:
>
> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 J. Wigmore, *Evidence* § 2285, p. 527 (McNaughton rev. 1961) (Wigmore) (emphasis in original, citations and footnote omitted).

Although satisfaction of Wigmore's four conditions is not necessary to recognition of a privilege for confidential communication, see *infra* at 16-19, commentators are in wide agreement that it is sufficient to require it. See, *e.g.*, 2 D. Louisell & C. Mueller, *Federal Evidence* § 201, p.655 (revised ed. 1985) (Louisell & Mueller); 8 Wigmore § 2396, p. 878 (priest-penitent privilege, not known to the common law, should be recognized because it meets each of the four criteria described above). Recognition of the psychotherapist-patient privilege would be appropriate upon consideration of utilitarian grounds alone, because the privilege meets these four conditions. See, *e.g.*, Louisell, *The Psychologist in Today's Legal World: Part II*, 41 Minn. L. Rev. 731, 746 (1957) (Louisell).[9]

First, communication with a psychotherapist does originate in confidence. The professional organizations from whom psychotherapists are drawn all impose ethical obligations of confidentiality upon their members. See, *e.g.*, American Psychiatric Association, *Principles of Medical Ethics, With Annotations Especially Applicable to Psychiatry*, § 4 (1984); American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, Ethical Standard 5 (1992); National Association of Social Workers, *Code of Ethics of the National Association of Social Workers*, Principle II.H (rev. 1993) (*NASW Code*). In practice, psychotherapists do keep patient communications confidential, and those who see psychotherapists expect their communications with them to be kept confidential. See, *e.g.*, McGuire, Toal and Blau, *The Adult Client's Conception of Confidentiality in the Therapeutic Relationship*, 16 Prof. Psychol.: Research & Practice 375, 380 (1985).

Second, without confidentiality effective psychotherapy would not be possible. To begin with, confidentiality is necessary to get many of those who need treatment even to seek it. Although a privilege for the identity of a patient is not at issue in this case, in light of the stigma and embarrassment that still attend mental illness and psychotherapeutic treatment, confidentiality — even of the patient's identity and of the very fact of treatment — is necessary if those who need treatment are not to be deterred from obtaining it. See, *e.g.*, 2 Louisell & Mueller § 216, p. 857

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[9] And, indeed, before the courts were overtaken by legislative action, the common law "had indicated a disposition to recognize a psychotherapist-patient privilege." See Advisory Committee Note to Proposed Rule 504, 56 F.R.D. at 242 (citing Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 Nw. U. L. Rev. 384 (1952)).

("Clearly, the idea of confidential communication must encompass the identity of the patient as well."). Consequently Illinois, to give just the example of the State in which this case arises, expressly includes the fact of psychotherapeutic treatment within the privilege. See 740 Ill. Comp. Stat. Ann. 110/2 (Supp. 1995); see also 42 C.F.R. § § 2.11, 2.12 (prohibition on use or disclosure of "patient identifying information" concerning anyone diagnosed or treated for substance abuse at facilities receiving federal funds). Unfortunately, the words of Professor Slovenko 35 years ago retain vitality in many communities in the United States today:

> It is vital to maintain confidentiality as to the fact of treatment as well as to communications made in treatment. By and large, people in the community, even those who are well-informed on other matters, consider a person's treatment by a psychiatrist as evidence of his "queerness" or even insanity. A person may hesitate to visit a psychiatrist out of fear that he will be set apart from his fellow men.

Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 188 (1960) (Slovenko) (footnote omitted). Cf. Bundy and Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and its Regulation*, 79 Calif. L. Rev. 315, 409 (1991) (arguing that attorney-client privilege does not protect client identity because "clients would communicate their identity to the lawyer with or without a guarantee of confidentiality in order to secure representation").

Even more fundamentally, without an assurance of confidentiality those who are patients may be deterred from the disclosures that are required for successful treatment. As the Group for the Advancement of Psychiatry put it:

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this rule . . ., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

Group for the Advancement of Psychiatry, Report No. 45, p. 92 (1960), *quoted in* Advisory Committee Note to Proposed Rule 504, 56 F.R.D. at 242.

A "privilege for those receiving psychotherapy is necessary if the psychiatric profession is to fulfill its medical responsibility to its patients." Slovenko, 6 Wayne L. Rev. at 199. This is because, in the words of the D.C. Circuit:

> Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. * * * It would be too much to expect them to do so if they knew that all they say — and all that the psychiatrist learns from what they say — may be revealed to the whole world from a witness stand."

Taylor v. *United States*, 222 F. 2d 398, 401 (CADC 1955) (quoting M. Guttmacher and H. Weihofen, *Psychiatry and the Law* 272 (1952)).

Most empirical studies, too, indicate that the possibility of nonconsensual disclosure of patient confidences would have a serious damaging effect on the psychotherapeutic relationship. See generally Applebaum, Kapen, Walters, Lidz and Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psychiatry & L. 109 (1984). In the absence of stronger empirical evidence to the contrary than that presented by Petitioner, the Court is entitled to conclude consistent with common sense, as it has in the attorney-client context, that denial of a privilege concerning information that an individual would not want made public will "discourag[e] the communication" of that information. See *Upjohn*, 449 U. S. at 392.[10]

Third, the relation between psychotherapist and patient is one which deserves recognition and countenance. The value to society of psychotherapy is great. Psychotherapeutic treatment has provided millions of Americans relief from the deep, and often debilitating distress of mental and emotional illness. It provides tools to allow an end to patterns of destructive behavior. It permits some who otherwise could not to play a productive role in society.

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[10] The studies Petitioner cites, Pet. Br. 26-28, do not support her argument. Most fundamentally, the article on which Petitioner primarily relies, Shuman, Weiner and Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 Int'l. Journal of L. and Psych. 393 (1986), concludes on the basis of the three studies undertaken by its co-authors and cited by Petitioner, see Pet. Br. 28, that "[s]uggesting a condition of no privilege produced a statistically significant reduction in lay persons indicating a willingness to discuss a variety of issues with therapists." 9 Int'l. Journal of L. and Psych. at 415-416.

The authors do also purport to show that the absence of the privilege had no effect on the degree to which psychotherapy patients reported withholding information from their therapists, but this conclusion is fatally flawed. The authors' study compared patients of psychiatrists in common-law Ontario with those in civil-law Quebec, which traditionally had a physician-patient privilege applicable to psychiatrists. As the study itself describes, however, although there was no such privilege at common law, the courts of Ontario have in practice refused to require testimony of psychiatrists and marital counselors, see *id.* at 396-401, 409, and the rates at which psychotherapists are required to disclose confidential communications in court is not significantly different under the two legal systems, *id.* at 411. Further, the study reveals that 81% of the patients surveyed in Ontario were under the impression that their communications were in fact protected by a psychotherapist-patient privilege. *Id.* at 407. Consequently, it would be both unremarkable and unrevealing if there were no difference in the disclosures made under these two legal systems.

It gives individuals a chance to lead more rewarding lives.

Finally, the benefit wrought by the privilege will outweigh the harm caused by it. The costs in terms of loss of evidence, although undoubtedly real, are not so substantial as to require rejection of the privilege. Most significantly, a psychotherapist-patient privilege would not provide a shroud of secrecy for the underlying facts relevant to the elements or defenses in any legal proceeding, but would protect only certain second-hand communications describing those facts.

As this Court has said, "[a] fact is one thing and a communication concerning that fact is an entirely different thing." *Upjohn*, 449 U. S. at 395-396 (internal quotation marks and citation omitted). If the privilege is recognized, the patient "may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his [privileged] communication." *Id* at 396. Consequently, what this Court said of the attorney-client privilege in *Upjohn* would be equally true of the psychotherapist-patient privilege: The privilege would "pu[t] the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated" with the psychotherapist. See *id.* at 395.[11]

The same could not have been said of those privileges that have been rejected by this Court Under Rule 501. In *University of Pennsylvania* v. *E.E.O.C.*, 493 U. S. at 182, this Court rejected a privilege for the peer review information that was relied upon in the very tenure decision at issue in that case. See *id.* at 185-187. Similarly, in *United States* v. *Gillock*, 445 U. S. 360, 366 (1980), this Court declined in a public corruption case to create a privilege barring the "introduction of evidence of legislative acts in federal criminal prosecutions against state legislators." That privilege could, in effect, have immunized Respondent's criminal conduct by preventing the introduction of "proof of the relevant facts." *Id.* at 374.

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[11] Courts would likely be required to create an exception to the privilege for cases in which the contents of the assertedly privileged communications are themselves at issue. No such circumstances, however, are presented in this case.

In this case, the scope of evidence that may be excluded by the privilege is dramatically narrower. "[T]he social value which effective psychiatric treatment has for the community far outweighs the potential loss of evidence." 2 Weinstein & Berger, ¶ 504[03], p. 504-18 (citation and internal quotation marks omitted).

2. A Civilized Society Must Respect the Privacy of Thoughts and Emotions Revealed to One's Psychotherapist

a. Perhaps even more important than the utilitarian justification is the second rationale for the recognition of a privilege for confidential communications: that it is required as a matter of "intrinsic decency." Letter of Professor Charles L. Black, Jr., to the Honorable William L. Hungate (February 5, 1973) (Black Letter) *reprinted in Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 2 at 240, 242 (1973) (*House Hearings*).

This rationale says that a privilege may be justified, not only by its instrumental significance in assuring a candid communication that society seeks to encourage, but also by the fact that society should, as a moral and ethical matter, recognize the essential privacy of communications made within certain significant relationships. See, *e.g.*, *Trammel* v. *United States*, 445 U. S. at 51 (privilege for communications between an individual and his or her clergyperson is provided in recognition of the "human need" for "total and absolute confiden[tiality]" in disclosures of "what are believed to be flawed acts or thoughts," made "to a spiritual counselor" by one seeking "priestly consolation and guidance"). Privileges for confidential communications made within certain relationships thus may be justified by "our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life," *Withrow* v. *Williams*, 113 S. Ct. 1745, 1753 (1993) (citations and internal quotation marks omitted), regardless of whether the

communications at issue would nonetheless be made in the absence of a privilege. The importance of this principle can hardly be overstated. Its vitality is necessary for the operation of a civilized society.[12]

Under this rationale, a privilege for communications between a patient and his or her psychotherapist is amply justified. Communications with one's psychotherapist "often concern the most intimate and embarrassing details of a patient's life, and their public exposure may well strip him of much of his own sense of human dignity." *Lora* v. *Board of Ed. of New York*, 74 F.R.D. 565, 571 (E.D.N.Y. 1977) (Weinstein, J.); see *In Re Doe*, 964 F. 2d 1325, 1328 (CA2 1992) ("[d]isclosure . . . would frequently be embarrassing to the point of mortification for the patient"). It would be indecent were a patient's most intimate thoughts and feelings rendered subject to courtroom display — whenever they might be even remotely relevant to any lawsuit that can survive a motion to dismiss — solely because they were communicated to a psychotherapist for purposes of diagnosis and treatment. Cf, *e.g.*, *Rochin* v. *California*, 342 U. S. 165, 173 (1952) (government must "respect certain decencies of civilized conduct" and may not require a doctor to pump the stomach even of a criminal suspect in order to obtain evidence of crime); see also *Skinner* v. *Railway Labor Executives Association*, 489 U. S. 602, 617 (1989) (disclosure of the results of the "chemical analysis of urine" "intrudes upon expectations of privacy that society has long recognized as reasonable" because it "can reveal a host of private medical facts" about an individual).

b. Viewed from the other side of the confidential communication, it would also be indecent to require the psychotherapist to reveal information that he or she has obtained in confidence during the course of diagnosis or treatment. Ethics and the preservation of trust require that confidential information obtained in the course of certain relationships not be divulged. See, *e.g.*, *Wolfle* v. *United States*, 291 U. S. at 14 (holding the privilege for confidential spousal communications justified because those communications are "so essential to the preservation of the marriage relationship").[13] This judgment is reflected in the ethical rules imposed upon all members of those professions that diagnose and treat mental illness, and in the laws of all fifty States, see *infra* at 19-20. It should likewise be reflected in the federal common law of privilege.

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[12] The significance of the continued vitality of this second type of justification is perhaps best illustrated by the privilege for confidential communication between husband and wife. It is unlikely that a case can be made that intimate communications between husband and wife are actually encouraged by the existence of a privilege covering those communications. McCormick § 86, p. 118. The candor within marriage is typically rooted in something far deeper than a concern about the remote possibility of civil or criminal litigation. Nonetheless, the privilege endures because it "serve[s] to protect the essential privacy of [this] significant human relationshi[p]." *Id.* § 72, p. 101.

The concern about the position in which a failure to recognize a privilege will put those who receive information that they are ethically or morally bound to keep in confidence was put most eloquently by Professor Black in a letter criticizing the Advisory Committee for its rejection in the Proposed Rules of the privileges for confidential communications between husband and wife and between doctor and patient:

> [T]he meaning of [Proposed Rule 505, which would have rejected a privilege for communications between husband and wife] . . . is that, however intimate, however private, however embarrassing may be a disclosure by one spouse to another, or some fact discovered, within the privacies of marriage, by one spouse about another, that disclosure or fact can be wrung from the spouse under penalty of being held in contempt of court, if it is thought barely relevant to the issues in anybody's lawsuit for breach of a contract to sell a carload of apples. It ought to be enough to say of such a rule that it could easily — even often — force any decent person — anybody any of us would want to associate with — either to lie or to go to jail. No rule can be good that has that consequence — that compels the decent and honorable to evade or to disobey it.
>
> . . . .
>
> [As to] the abolition of the physician-patient privilege. . . . [a]ll of us would consider it indecent for a doctor, in the course, say, of a television interview, or even in a textbook, to tell all he knows, naming names, about patients who have been treated by him. Why does this judgment of decency vanish from sight, sink to absolute zero, as soon as somebody files any kind of non-demurrable complaint in a federal court? Here again, can a rule be a good one when the ethical doctor *must* violate it, or hedge, or evade?

Black Letter, *reprinted in House Hearings* at 241-242.

These words certainly apply to the relationship between psychotherapist and patient. Failure to recognize the psychotherapist-patient privilege would come at an unacceptable cost to the integrity of both parties to that sacrosanct relationship. In a civilized society, the privacy of confidential communications between patient and psychotherapist requires legal recognition.

3. Failure to Recognize the Privilege Would Leave the Federal Courts Alone Among American Courts

If "[r]eason thus supports recognition" of the privilege, see *In Re Doe*, 964 F. 2d at 1328, so, too, does experience. In light of the foregoing discussion, it should be unsurprising that the psychotherapist-patient privilege has gained virtually universal recognition in the United States.

a. First, as Petitioner concedes, Pet. Br. 31, every State has recognized the sanctity of the psychotherapist-patient relationship, and has adopted some form of psychotherapist-patient privilege. See Petition for Certiorari Appendix (Pet. App.) 20 and n. 17. This amounts to more than the mere "trend" in the law relied upon by the Court in prior Rule 501 cases. See, *e.g., United States* v. *Zolin*, 491 U. S. at 570; *Trammel*, 445 U. S. at 48-50. If this Court rejects the privilege, the federal courts will stand alone among American courts. Of course, the federal courts are not *bound* in cases like this by state laws of privilege, but the considered judgment of all fifty States should carry enormous, perhaps dispositive weight with this Court as it seeks the light of "reason and experience."

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[13] This requirement was recognized as long ago as Hippocrates:

> Whatsoever things I see or hear . . . in my attendance on the sick . . ., which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets.

Hippocratic Oath *reprinted in* 23 *The New Encyclopædia Britannica* 889 (15th ed. 1987).

Indeed, in light of the uniform recognition of some form of psychotherapist-patient privilege under each State's law, failure to recognize a federal psychotherapist-patient privilege would raise a substantial federalism concern. The protection of the health of its citizens is of course one of a State's traditional police powers. See, *e.g., Jacobson* v. *Massachusetts*, 197 U. S. 11, 30-31 (1905). Each State's judgment to provide a privilege for communications between patient and psychotherapist reflects at least in part a desire to encourage the effective treatment of mental and emotional illness. A decision by this Court to deny the privilege under Rule 501 would destroy the confidence of patients in each State that their communications with their psychotherapists will be kept confidential. This would undercut at least to some extent every State's attempt to regulate, in part through its law of privilege, the delivery of mental health services within its borders.

b. Second, those *federal* Courts of Appeals that have taken the approach to privilege required by Rule 501 and the decisions of this Court have all recognized the psychotherapist-patient privilege. See *Jaffee* v. *Redmond*, Pet App. 1 (CA7 1995) (opinion below); *In Re Doe*, 964 F. 2d at 1325 (CA2 1992); *In re Zuniga*, 714 F. 2d 632 (CA6), cert. denied, 464 U. S. 983 (1983). As Judge Winter concluded in *In re Doe*, "[t]he cases rejecting the privilege are not helpful . . . because they are founded on the view that Rule 501 limits the development of privileges to those recognized by the common law, a position that we regard as contrary to the teaching of *Trammel* 'not to freeze the law of privilege.' 445 U. S. at 47." 964 F. 2d at 1328.[14]

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[14] The Fourth, Fifth and Eleventh Circuits have rejected the psychotherapist-patient privilege in summary fashion by flatly stating that no physician-patient

c. Next, most scholarly opinion lies on the side of recognizing the privilege. See, *e.g.*, 25 Wright & Graham § 5522, p. 136; 2 Weinstein & Berger ¶ 504[03], p. 504-17 n. 1 (collecting sources). This is the judgment even of many scholars who reject as unjustified the distinct privilege for confidential communications between a patient and his or her non-psychiatrist physician. Compare, *e.g.*, E. Cleary, *McCormick on Evidence* § 99, p. 213 n. 9 (2d ed. 1972) with *id.* § 105, p. 228.

d. Finally, even the Advisory Committee's Proposed Rules, roundly criticized for their narrow approach to privileges for confidential communications, included a version of the psychotherapist-patient privilege, one that would have protected communications between a patient and a psychiatrist or a licensed or certified psychologist. See 56 F.R.D. at 240 (Proposed Rule 504). Although the Proposed Rules were rejected by Congress, their inclusion of a psychotherapist-patient privilege further argues for its recognition.

It is clear that the intention of the Congress in rejecting the Proposed Rules was not to deny altogether the validity of any of the

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privilege of any kind existed at common law. See, *e.g.*, *United States* v. *Meagher*, 531 F. 2d 752, 753 (CA5) (in a case involving a psychiatrist, court refused only "to recognize a physician-patient privilege"), cert. denied, 429 U. S. 853 (1976); *Hancock* v. *Hobbs*, 967 F. 2d 462, 466 (CA11 1992) (concluding that "[f]ederal common law does not recognize a psychiatrist-patient privilege," in reliance only on the statement that "The physician-patient evidentiary privilege is unknown to the common law."); *United States* v. *Corona*, 849 F. 2d 562, 567 (CA11 1988) (common law does not "provid[e] for any type of physician-patient privilege"), cert. denied, 489 U. S. 1084 (1989); *Slakan* v. *Porter*, 737 F. 2d 368, 377 (CA4 1984) (relying only on the Fifth Circuit's decision in *Meagher*, *supra*, for the "well-settled federal rule that such communications are not privileged"), cert. denied, 470 U. S. 1035 (1985). Similarly, a panel of the Ninth Circuit declined in a brief *per curiam* opinion to recognize the privilege on the ground that the court was empowered under Rule 501 only "to . . . develo[p] . . . privileges extant in the common law." *In Re Grand Jury Proceedings*, 867 F. 2d 562, 565 (CA9) (*per curiam*), cert. denied, 493 U. S. 906 (1989).

The Tenth Circuit in *U.S.* v. *Burtrum*, 17 F. 3d 1299, 1301-1302 (CA10), cert. denied, 115 S. Ct. 176 (1994), rejected a psychotherapist-patient privilege in the context of a criminal prosecution for child sexual abuse. The court, however, made clear that it was not rejecting the psychotherapist-patient privilege altogether, but was "decid[ing] only the narrow question of whether to recognize a psychotherapist/client privilege in a criminal child sexual abuse context."

particular privileges that would have been protected under them. To take the most plain example, "[o]bviously . . . [Congress's] failure to adopt promulgated Rule 503, dealing with the attorney-client privilege, did not mean that this privilege should not be recognized in the federal courts." *United States* v. *King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976) (Weinstein, J.).

The legislative history of Rule 501 confirms this reading. The Report of the Senate Judiciary Committee states:

> The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule[s] submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, [*i.e.*, Rule 501,] the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient . . ., or any other of the enumerated privileges contained in the Supreme Court rules.

S. Rep. No. 93-1277, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. and Admin. News 7051, 7059.

This Court has in the past relied on an examination of the Proposed Rules in assessing a claim for recognition of a privilege under Rule 501. See *United States* v. *Gillock*, 445 U. S. at 367-368 (relying in part on the absence in the Proposed Rules of a privilege for state legislators in declining to recognize any such privilege as a matter of federal law). As Judge Weinstein and Professor Berger have said: "[I]n many instances the proposed rules . . . remain a convenient and useful starting point for examining questions of privilege." 2 Weinstein & Berger ¶ 501[03], p. 501-32.

II. FAILURE TO RECOGNIZE THE PSYCHOTHERAPIST-PATIENT PRIVILEGE WOULD NEEDLESSLY RENDER THE PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS WITH CLERGY VULNERABLE TO ESTABLISHMENT CLAUSE CHALLENGE

The Establishment Clause requires neutrality toward religion. *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2521 (1995). It thus prohibits government from "favoring religious adherents collectively over nonadherents." See *Board of Education of Kiryas Joel* v. *Grumet*, 114 S. Ct. 2481, 2487 (1994) (plurality opinion); *id.* at 2497 (O'Connor, J., concurring in part and concurring in judgment). Because of this principle, failure to recognize the psychotherapist-patient privilege would render vulnerable to constitutional challenge the analogous privilege for confidential communications between a religious individual and his or her clergyperson.

For many non-religious Americans, the psychotherapist plays a role similar to one played for many religious believers by members of the clergy. Patients seek consolation and guidance in the office of their psychotherapist. They address emotions related to the events of life and their relationships with others: grief, disappointment, loneliness, anxiety, regret, concern and sadness.

The opportunity "to disclose to a . . . counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive . . . consolation and guidance in return," *Trammel*, 445 U. S. at 51 (describing privileged communications between an individual and his or her clergyperson), cannot consistent with the Establishment Clause be provided to those of faith alone. To favor confidential communications with a clergyperson over those with a psychotherapist would be to abandon the neutrality toward religion that is required by the Constitution, and to advance religion. See, *e.g. Welsh* v. *United States*, 398 U. S. 333, 356-361 (1970) (Harlan, J., concurring in judgment) (Establishment Clause forbids the government to provide an exemption from military service for those whose conscientious objection to war emanates from a religious source, but not for those whose similar beliefs have a secular grounding). It would express an impermissible judgment that "priestly consolation and guidance," *Trammel*, 445 U. S. at 51, are more deserving of special protection than consolation and guidance of a secular type.

Although this case does not involve the question whether a psychotherapist-patient privilege is compelled by the Constitution, the Court should certainly take cognizance of the constitutional consequences that would likely follow from a failure to recognize the privilege. Just as the Court has in the past construed laws to avoid the discriminations that would have rendered them invalid under the Establishment Clause, see, *e.g. Welsh*, 398 U. S. at 340 (1970) (plurality opinion) (construing the Universal Military Training and Service Act so as to sustain a conscientious objector claim rooted in "deeply and sincerely h[eld] beliefs that are purely ethical and moral in source"); *United States* v. *Seeger*, 380 U. S. 163, 173-185 (1965) (construing that provision to permit a conscientious objector claim not founded on a theistic belief), so, too, the Court here should construe the scope of privilege under Rule 501 in a way that does not render the privilege for confidential communications to one's clergyperson susceptible to Establishment Clause challenge.

III. COUNTERVAILING CONCERNS SHOULD BE ADDRESSED THROUGH EXCEPTIONS, AS THEY ARE IN THE CASE OF ATTORNEY-CLIENT PRIVILEGE

Petitioner raises at least one countervailing concern specific to this case, a concern about the possibility that Respondent Officer Mary Lu Redmond's testimony at trial was based on memory "enhanced" by her sessions with her psychotherapist, Karen Beyer. Pet. Br. 21-25. To begin with, this case therefore presents an appropriate opportunity for this Court to delineate the proper approach for addressing such countervailing concerns.

Under Rule 501 countervailing concerns that relate to specific applications of the psychotherapist-patient privilege should be addressed by categorical exceptions rather than by application of an *ad hoc* balancing test. This is the approach that this Court has taken with respect to other privileges recognized under the Rule. Thus, for example, in the context of the attorney-client privilege, an otherwise-privileged communication will not be protected if it falls within the crime-fraud exception to the privilege. But beyond an examination of the facts of each case to see whether the communication at issue falls within such a categorical exception, the court does not engage in an assessment in each case of the costs and benefits of adherence to the privilege. See, *e.g.*, *United States* v. *Zolin*, 491 U. S. 554, 562-563; cf. *Trammel*, 445 U. S. at 53

(holding categorically that there is no prohibition on spousal testimony where the witness-spouse wishes voluntarily to testify).[15]

An approach of addressing through categorical exceptions concerns about application of the privilege in particular contexts is also far preferable in operation to the use of an *ad hoc* balancing test. As the Court said in *Upjohn*, "if the purpose of the . . . privilege is to be served, the [individuals who are party to the privileged communication] must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 449 U. S. at 393.

In this case, Petitioner alleges that testimony by Officer Redmond was the product of some sort of therapeutically "enhanced" memory. Pet. Br. 22-25; accord *id.* at 10. The circumstances of this case obviously do not raise the same concerns involved in those widely-publicized cases of "recovered memory" of childhood sexual abuse.[16] In a true case of recovered memory testimony it might well be appropriate, were the testimony held admissible, to create an exception to the psychotherapist-patient privilege. A privilege for confidential communications is not designed to shield underlying facts. Evidence concerning them can ordinarily be adduced at trial, for example, by compelling the patient herself to testify about them. See, *e.g.*, *Upjohn*, 449 U. S. at 396. If the memories to which the patient will testify have themselves been "recovered" during some form of therapy, however, that therapy itself may become an appropriate issue for exploration in the case.

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[15] In the psychotherapist-patient context there would be no need for a "crime-fraud" exception *per se*, because an individual cannot use communications with a psychotherapist, as he or she might use communications with a lawyer, "for the purpose of getting advice for the commission of a fraud or crime." *Zolin*, 491 U. S. at 563 (internal quotation marks and citation omitted). In a controversial decision, the California Supreme Court has held that when a psychotherapist determines that a patient "poses a serious danger of violence to others," that psychotherapist has a duty under state tort law to warn the police or the intended victims in circumstances where such warning is "necessary to avert danger to others." *Tarasoff* v. *Regents of the University of California*, 551 P. 2d 334, 344-348 (Cal. 1976) (In Bank). Whether such a circumstance could ever occur in the course of federal litigation to which a federal psychotherapist-patient privilege would otherwise apply, and whether, if so, the courts should in such a circumstance create an exception to the privilege, are of course questions not before this Court in the instant case.

[16] See, *e.g.*, *Franklin* v. *Duncan*, 884 F. Supp. 1435, 1438 (N.D.Cal. 1995).

This Court, however, need not even address the issue in this case because there is no basis for Petitioner's claim of enhanced memory. Officer Redmond did testify to an improvement in her memory of how she held her gun on the day of the shooting at issue in this case. Joint Appendix 141-142; accord *id.* at 142-143, 139-140. In addition, Ms. Beyer testified that Officer Redmond told her at one point that she could not recall pulling the trigger of her gun, and that Officer Redmond was later able to recall this event. *Id.* at 113. There is, however, no evidence in this record that Officer Redmond's psychotherapy played any role in improving her memory. There is therefore an insufficient basis upon which to raise a claim that Officer Redmond's communications with Ms. Beyer come within any recovered-memory exception.[17]

Petitioner also may be read to suggest — again without any factual support — that the communications at issue in this case should not be protected by the privilege because of the risk that Officer Redmond's testimony was "rehearsed" in sessions with her psychotherapist, a "person employed by the Village of Hoffman Estates." Pet. Br. 22. This concern cannot justify an exception to the psychotherapist-patient privilege.

In *Upjohn* this Court faced a situation in which the risk of improper coaching by a potentially-liable employer was far greater, yet the Court there was not deterred from recognizing the otherwise-proper claim of privilege. That case involved conversations about potentially illegal conduct between corporate employees and lawyers under the direction of in-house corporate counsel, who of course would have been fully aware of the legal implications of any information conveyed to them. See 449 U. S. at 386-389. Here, by contrast, Ms. Beyer, a licensed clinical social worker, is not trained in the requirements of the law. Moreover, in contrast to the lawyers in *Upjohn*, Ms. Beyer had a primary ethical obligation not to her employer but to Officer Redmond. See *NASW Code*, Principle II.F. Further, under Illinois law the information a clinical social worker like Ms. Beyer receives during a counselling session cannot be revealed to an employer like the Village of Hoffman Estates, regardless of who pays for the psychotherapy. See 740 Ill. Comp. Stat. Ann. § § 110/1 to 110/12.2 (1993 & Supp. 1995). The tools of cross-examination are plainly adequate in the circumstances of this case — as they must be in every case in which a witness has spoken with an attorney — to address any concerns about the type of abuse Petitioner implies.

IV. THE PRIVILEGE SHOULD BE DEFINED BY THE PSYCHOTHERAPIST'S FUNCTION, NOT BY HIS OR HER TITLE

This case involves application of the privilege to communications with a clinical social worker, Karen Beyer, licensed under Illinois law to "provi[de] mental health services," by procedures including "individual, marital, family and group psychotherapy," for the "evaluation, treatment, and prevention of mental and emotional disorders . . . based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress." 225 Ill. Comp. Stat. Ann. § 20/3 (1995). Communications made to Ms. Beyer in the course of psychodiagnosis and psychotherapy clearly therefore should be covered by the privilege.

Petitioner urges this Court to adopt an arbitrary line, one that derives from rejected Rule 504, between psychiatrists and psychologists on the one hand, and other licensed or certified psychotherapists on the other. See Pet. Br. 39-40. This Court should reject that proposal. Because the justifications for the psychotherapist-patient privilege turn on the function performed by the psychotherapist, its applicability should turn on that as well. See Louisell, 41 Minn. L. Rev. at 742. Consequently the privilege should be defined to apply to communications made to any psychotherapist licensed or certified by law to diagnose or treat mental or emotional disorders, regardless of his or her title.

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[17] Should the Court disagree about the strength of this evidence, the appropriate course would be to affirm the judgment of the Court of Appeals vacating the judgment of the District Court, and to instruct the District Court to consider in the first instance on remand the question of recovered memory. A party who could show "a factual basis adequate to support a good faith belief by a reasonable person" that testimony being given was "enhanced" or "recovered" through psychotherapy would probably be entitled, at the District Court's discretion, to an *in camera* review of the psychotherapist-patient communications at issue. *Zolin*, 491 U. S. at 572 (describing standard and procedure for evaluating an analogous claim that the crime-fraud exception applies).

Although one could argue that the case for the privilege applies to communications made even to unlicensed or uncertified practitioners of psychotherapy, licensing or certification provides an appropriate limit for this federal privilege. First, the adoption of licensure or certification procedures for members of a profession indicates recognition of that profession's value as a provider of an accepted form of treatment. Next, licensure or certification of an individual indicates recognition of that person's professionalism and of his or her competence as a member of his or her profession. Finally, licensure or certification of a psychotherapist may increase the expectation of a patient that his or her communications will be held in confidence. See Louisell, 41 Minn. L. Rev. at 742 n. 41.

Clinical social workers provide essentially the same psychotherapeutic services as psychiatrists and clinical psychologists. Indeed, a high percentage of mental health services in the United States are provided by clinical social workers. For example, in mental health organizations, in private psychiatric hospitals, and in freestanding outpatient psychiatric clinics, the number of social workers is greater than the number of psychiatrists and psychologists combined.[18] A categorical distinction based solely on job title rather than professional function would thus unjustifiably and drastically limit the class of psychotherapeutic patients protected by the privilege. For this reason, many commentators have urged its rejection. See, *e.g.* 25 Wright & Graham § 5525, p. 188.

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[18] See U.S. Dept. of Health and Human Services, Center For Mental Health Services, *Mental Health, United States, 1994* 107-113 (Manderscheid and Sonnenschein, ed. 1994) (*Mental Health*) (1990 data).

It is true that the limitation urged by Petitioner was proposed by the Advisory Committee in Proposed Rule 504. However no satisfactory explanation has ever been given for the Advisory Committee's decision to draw this line in the Proposed Rules. See *Id.* § 5526, p. 190-191. In any event, in the year after the Proposed Rules were promulgated only two States provided a privilege for communications between a patient and a certified or licensed social worker. See Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 Calif. L. Rev. 1050, 1052 n. 11 (1973). Today, twenty-two years later, forty-four States and the District of Columbia provide some form of privilege to communications between a patient and a licensed or certified clinical social worker.[19] This is a clear indication that whatever purpose the distinction might have served has long since evaporated.

Arbitrarily limiting the privilege to psychiatrists and psychologists could also have grave economic consequences. As a rule, clinical social workers provide diagnosis and treatment of mental and emotional disorders at less cost than those professionals do. Indeed, at a time when health care costs have escalated, clinical social workers have been relied upon to provide an increasingly great share of mental health services in some settings.[20] Refusal to recognize a privilege for licensed clinical social workers, however, would likely decrease the extent to which many in need of psychotherapy would find treatment by a licensed clinical social worker acceptable, both because clinical social workers would be unable to offer confidentiality and because this inability would brand them as second-class providers of health care. As demand for the limited pool of psychologists and psychiatrists grew, the price of those professionals' psychotherapeutic services would rise even further. The net result would be a reduction in the availability of needed mental health care services and a substantial increase in their cost. See *House Hearings* at 480-481 (statement by Col. Sherman Ragland).

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[19] Of the nine States described by Petitioner as without a privilege for confidential communications with a licensed or certified clinical social worker, see Pet. Br. 35 n. 66, three in fact do have such a privilege. See Ariz. Rev. Stat. Ann. § 32-3283 (1992); Utah R. Evid. Ann. 506 (1995); Tex. R. Civ. Evid. 510 (West 1995); Tex. Hum. Res. Code Ann. § 50.001(b)(6) (West Supp. 1996).

[20] See, *e.g.*, *Mental Health* 114 (data over time for freestanding partial care and multiservice mental health organizations).

Just as refusal to recognize the privilege altogether would undermine state efforts to encourage the treatment of mental illness, see *supra* at 20, so an artificial refusal to include communications with licensed or certified clinical social workers within the privilege could wreak havoc on state attempts to control health care costs. A failure by this Court to recognize the psychotherapeutic function performed by clinical social workers under the authorization of state law could cause a substantial disruption in this area of traditional state regulation. Both practical considerations and a proper regard for this Court's role in the federal system therefore counsel against the exclusion of communications with licensed or certified clinical social workers from the protection of the psychotherapist-patient privilege.

CONCLUSION

The Court should recognize the psychotherapist-patient privilege and affirm the judgment of the Court of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr., Deceased,
Petitioner,

v.

MARYLU REDMOND and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit**

BRIEF FOR THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE ILLINOIS CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL FEDERATION OF SOCIETIES FOR CLINICAL SOCIAL WORK, THE ILLINOIS SOCIETY FOR CLINICAL SOCIAL WORK, AND THE AMERICAN BOARD OF EXAMINERS IN CLINICAL SOCIAL WORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-266

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr., Deceased,
Petitioner,
v.

MARYLU REDMOND and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit**

BRIEF FOR THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE ILLINOIS CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE NATIONAL FEDERATION OF SOCIETIES FOR CLINICAL SOCIAL WORK, THE ILLINOIS SOCIETY FOR CLINICAL SOCIAL WORK, AND THE AMERICAN BOARD OF EXAMINERS IN CLINICAL SOCIAL WORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI*

The National Association of Social Workers (NASW) is a professional membership organization comprised of more than 155,000 social workers with chapters in every state, the District of Columbia, New York City, Puerto Rico and the Virgin Islands, and an international chapter in Europe. The Illinois Chapter of the NASW has over 8,500 members, one of whom is Karen Beyer, the licensed clinical social worker who provided treatment to Respondent Marylu Redmond. Created in 1955 by the merger of seven predecessor social work organizations, the NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. In furtherance of its purposes, the NASW promulgates professional standards and criteria including *Standards for the Practice of Clinical Social Work* and *Guidelines for Clinical Social Work Supervision*, conducts research, publishes studies of interest to the profession, provides continuing education and enforces the *NASW Code of Ethics*. The NASW also sponsors a voluntary credentialing program to enhance the professional standing of social workers including the NASW Diplomate in Clinical Social Work and the Qualified Clinical Social Worker credentials.

Founded in 1973, the National Federation of Societies for Clinical Social Work (NFSCSW) is a federation of state societies whose members, numbering approximately 16,000, are all licensed or certified clinical social workers engaged in the diagnosis and treatment of mental and emotional disorders. The primary mission of NFSCSW and its member state societies is to enhance the quality and availability of clinical social work services throughout the United States by promulgating and enforcing its *Standards of Practice for Clinical Social Work* and its *Code of Ethics*, advocating the enactment of state and federal legislation to regulate the practice of clinical social work in order to protect the interests of patients, providing continuing education to members of the profession, encouraging educational institutions to provide the highest level of clinical social work education and training, and advocating the inclusion of clinical social workers as reimbursable providers in public and private health insurance programs. The Illinois Society for Clinical Social Work is the NFSCSW member organization whose individual members are clinical social workers licensed and practicing in that state.

The American Board of Examiners in Clinical Social Work (ABE) is an independent, nonprofit, national credentialing board founded in 1987 to provide diplomate-level board certification for advanced practitioners of clinical social work. Since its inception, ABE has certified approximately 21,500 clinical social workers as Board Certified Diplomates (BCDs). Criteria for diplomate status include a graduate degree in clinical social work, postgraduate clinical supervision, at least 7,500 hours of direct practice experience within a five-year period, fulfillment of requirements for state licensing, and successful completion of an advanced examination. All BCDs must be recertified annually to maintain currency of the credential; recertification requires 20 hours of continuing social work education, maintenance of the state's highest regulatory status for social workers, and 300 hours of direct clinical practice in the preceding 12 months. There are over 14,000 BCDs in the field, nearly 90 percent of whom have over a decade of clinical experience.

As the principal professional organizations involved with clinical social workers in the United States and in the State of Illinois, these *amici* have a strong interest in the issues presented in this case. Presently, the Codes of Ethics and Standards of Practice adopted and enforced by *amici* and the laws of nearly every state, including the State of Illinois, require clinical social workers to maintain the confidentiality of their communications with their patients, recognizing that such confidentiality is essential for the diagnosis and treatment of mental and emotional conditions. If the Court of Appeals' recognition of a privilege for such communications were not to stand, clinical social workers would face the dilemma of being ordered to violate state law and well established professional standards which they believe are crucial to their provision of effective mental health services.

This brief focuses primarily on the second question presented by the Petition—whether a psychotherapist-patient privilege should apply to psychotherapy provided by clinical social workers to the same extent as psychotherapy provided by psychiatrists and psychologists. Other *amici* brief the issue of whether the Court should recognize a psychotherapist-patient privilege in general. The principal function of this brief is to inform the Court about the significant role clinical social workers play as psychotherapists and to demonstrate that, based on their training, education, professional standards and status under state law, the psychotherapy services provided by social workers deserve to be treated in the same manner as those provided by psychiatrists and psychologists for the purposes of Rule 501.

CONSENT OF PARTIES

This brief as *amici curiae* in support of Respondents is filed with the consent of all parties.

SUMMARY OF ARGUMENT

Clinical social workers are now the predominant providers of psychotherapy, as reflected in the broad acceptance of clinical social workers as compensable providers by federal and state health programs and private insurers. For the less economically advantaged and those living in many inner-city or rural areas, clinical social workers constitute an even higher percentage of mental health care providers. In the past twenty-five years, clinical social work has received widespread recognition as a distinct profession, *inter alia* through state licensing and certification regimes and the growth and development of specific standards of clinical practice and ethical rules. As an important aspect of this evolution, all but six states have recognized, with limited exceptions for particular circumstances, a psychotherapist-patient privilege protecting confidences imparted to clinical social workers by their therapy patients. Congress has also adopted certain confidentiality rules which encompass services by clinical social workers.

These important developments must guide this Court's application of Rule 501 of the Federal Rules of Evidence "in the light of reason and experience." Thus, this Court should not only recognize a general psychotherapist-patient privilege, consistent with the rule proposed in 1972 for inclusion in the Federal Rules of Evidence, but also should acknowledge the application of that privilege to clinical social workers and their patients. Whatever exceptions may be appropriate in criminal cases and other evidentiary contexts, there should be none in this civil damages case, where testimony concerning what was said in therapy was not necessary to prove an essential element of Petitioner's cause of action.

ARGUMENT

I. CLINICAL SOCIAL WORKERS ARE THE PREDOMINANT PROVIDERS OF PSYCHOTHERAPY TODAY, AND CONSTITUTE A FULLY DEVELOPED PROFESSION WHOSE PATIENT COMMUNICATIONS ARE WORTHY OF PROTECTION.

A. Clinical Social Workers Are The Major Providers Of Psychotherapeutic Services And Are Recognized As Authorized Providers Under Federal Health Programs, State Insurance Laws And Private Insurance Contracts.

Years ago, the delivery of psychotherapy to persons with mental illness and emotional disorders was the province of a small number of medical doctors, trained in the theories of Sigmund Freud, Karl Jung and their followers and successors. Today, psychotherapy employs a wide variety of modalities and theoretical orientations and is provided by a much greater number and broader range of mental health professionals.

The greatest proportion of psychotherapeutic services is now delivered by clinical social workers working in various settings including independent private practice.[1] For example, a study of professional patient care staff in mental health organizations and general hospital psychiatric services in 1990 found that the number of social workers providing mental health services in such facilities (53,375) was more than the combined number of psychiatrists (18,818) and psychologists (22,825).[2] Clinical social workers are the predominant mental health professionals in facilities serving less privileged patients such as state and county mental hospitals, residential treatment centers for emotionally disturbed children, freestanding outpatient clinics, and freestanding partial care and multiservice organizations.[3] Clinical social workers also are the predominant and often exclusive providers of mental health services in rural areas.[4] One study found, for example, that in approximately one quarter of the counties in a six state area, social workers were the only licensed providers of mental health services.[5] These

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[1] For a general description of the practice of clinical social work, *see* Swenson, *Clinical Social Work, in* 1 *Encyclopedia of Social Work* 502-12 (19th ed. 1995) ("*Encyclopedia*").

[2] *See* U.S. Department of Health and Human Services, Center for Mental Health Services, *Mental Health, United States, 1994*, at 107 (1994).

[3] *See id.* at 108, 112, 113, 114. The ratio of clinical social workers to psychiatrists and psychologists is lower in private psychiatric hospitals and the separate psychiatric services of non-federal general hospitals. *See id.* at 109, 110.

[4] 54.0% of the rural counties in the United States have ambulatory mental health care facilities, where clinical social workers are predominant, while only 4.2% of such counties have overnight facilities, such as 24-hour care in a hospital setting, residential treatment care and residential supportive care facilities. *See id.* at 129.

[5] National Center for Social Policy and Practice, *Preliminary Report of the Geographic Distribution of Mental Health Providers* (1988). A follow-up study in 1993 in five additional states confirmed these findings. *See* National Center for Social Policy and Practice, *Geographic Distribution of Mental Health Providers*

counties tended to be rural and to have lower per-capita incomes than the state average.

The expanded role of clinical social workers in the provision of mental health care in the United States is in large part the result of federal and state government policies that recognize the valuable role of clinical social workers. Since their emergence in the 1960s, the major federal health care programs have all been expanded to include coverage of mental health services by independent clinical social workers. In 1980, for example, Congress directed the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)[6] to conduct a two-year demonstration project in which licensed and certified clinical social workers would be reimbursed as mental health care providers without supervision by a physician. *See* Department of Defense Appropriation Act of 1981, Pub. L. No. 96-527 (1980). The Senate Report which reviewed the results of the demonstration project stated: "No quality of care problems have arisen, and reimbursement of clinical social workers costs less than the traditional physician gate-keeper approach." S. Rep. No. 580, 97th Cong., 2d Sess. 32 (1982). As a result of these findings, CHAMPUS has since recognized clinical social workers as independent providers of outpatient psychotherapy,

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(unpublished 1993). The distribution of mental health providers may result from the location of professional training programs. For example, teaching hospitals and other residency training sites for psychiatrists are affiliated with medical schools, which tend to be located in or near large population centers. As a result, five primarily rural states, Idaho, Montana, Nevada, Wyoming and Alaska, have no psychiatric residency training sites and hence no psychiatric residents. *See* U.S. Department of Health and Human Services, Center for Mental Health Services, *Mental Health, United States, 1992*, at 143 (1992).

[6] CHAMPUS provides health care services to approximately 6.2 million members of the armed services, military retirees, dependents, veterans, and employees of the United States Public Health Service and the National Oceanographic and Atmospheric Administration.

and has mandated reimbursement for covered services provided by clinical social workers. *See* Department of Defense Appropriation Act of 1983, Pub. L. No. 97-377 (1983); 32 C.F.R. § 199.12(f), 49 Fed. Reg. 7562 (1984).

Similarly, in 1986 Congress amended the enabling legislation for the Federal Employees Health Benefits Program (FEHBP)[7] to require all participating insurance companies to include clinical social workers as reimburseable providers of mental health services without physician supervision. *See* Federal Employees Benefits Improvement Act of 1986, Pub. L. No. 99-251, § 105(b), *as amended by* Pub. L. No. 100-202, § 101(m), *codified at* 5 U.S.C. § 8902(k)(1) (1986). Congress found that addition of this service "will contribute to cost containment and increased access to mental health services." H.R. Rep. No. 292, 99th Cong., 1st Sess. 6 (1985).

In 1987, Congress added clinical social work services provided pursuant to a contract with a Health Maintenance Organization (HMO) to the list of services reimbursable under the Medicare program. *See* Pub. L. No. 100-203, § 4074(a)(1), *as amended by* Pub. L. No. 100-360, § 411(h)(5)(A), *codified at* 42 U.S.C. § 1395x(s)(2)(H)(ii). Two years later Medicare coverage was expanded to include all independent clinical social work services. *See* Pub. L. No. 101-239, § 6113(b), *codified at* 42 U.S.C. §§ 13951(a)(1)(F), 1395x(s)(2)(N). Coverage of clinical social work services also has been mandated in the Medicaid program for low income families and individuals. *See* 42 U.S.C. § 1396d(a)(6). Recently, clinical social workers were added to the list of eligible direct providers of services under the Family and Medical Leave Act. *See* 29 C.F.R. § 825.118(b)(2).

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[7] In the FEHBP, private insurers under contract with the federal government provide health care services to more than ten million federal employees, retirees and their dependents.

Private health insurance plans have also contributed to the dramatic growth of clinical social work services. Under pressure from employers, unions and consumers, insurance contracts almost universally recognize clinical social workers as directly reimbursable providers of treatment for emotional and mental illness and substance abuse.[8] Legislation in many jurisdictions requires that if health insurance provides mental health coverage, the beneficiary must be given freedom to choose any qualified mental health provider, including clinical social workers.[9]

The role of clinical social workers has been greatly increased by the evolution of mental health care from in-patient to out-patient services, and by efforts at cost containment by the health care industry, employers and government. A national survey of mental health, alcohol and drug abuse treatment in HMOs found, for example, that 30 percent of all HMO mental health staff are clinical social workers, as compared to 22 percent for psychologists, 22 percent for substance abuse counsellors, 12 percent for psychiatric nurses, and 15 percent for psychiatrists.[10] Since it is widely predicted that the end of this century will see 90 percent or more of all mental health services provided through managed care systems,[11] the expansion of the clinical social worker role in the delivery of mental health treatment is certain to continue. Additionally, Employee Assistance Plans (EAPs), which are a relatively new employee benefit to help employees cope with such difficulties as substance abuse, mental illness, stress and family problems, tend to rely principally on clinical social workers for delivery of psychotherapy.[12]

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[8] Nationally, 63% of all employees are enrolled in a managed care insurance plan; clinical social workers are recognized as providers by all of the major managed care companies. The other 37% are enrolled in indemnity or self-insured plans; a survey of large companies in New York shows that these plans also recognize clinical social workers as providers of mental health care. *See MCO Panel Make-Up By Discipline*, Practice Strategies, September, 1995, at 9; National Association of Social Workers, *Third-Party Reimbursement for Clinical Social Work Services* 6 (1995); National Federation of Societies for Clinical Social Work, *Companies Utilizing Clinical Social Workers* (unpublished 1995); Foster Higgins, *National Survey of Employer-Sponsored Health Plans* (1994).

[9] Thirty-one states and the District of Columbia have vendorship or consumer freedom-of-choice laws. *See* Alaska Stat. § 21.36.090; Cal. Health & Safety Code § 1373(h)(2); Colo. Rev. Stat. Ann. § 10-16-104(5)(b)(I)-(III); Conn. Gen. Stat. Ann. § 38a-514; D.C. Code Ann. § 35-2302; Fla. Stat. Ann. § 627.668; 215 ILCS 5/370; Kan. Stat. Ann. § 40-2,114; La. Rev. Stat. Ann. § 22:669; Me. Rev. Stat. Ann. tit. 24, § 2303; Md. Code. Ann., Ins. § 354L; Mass. Gen. Laws Ann. ch. 176A, § 8A; Minn. Stat. Ann. § 62Q.095; Miss. Code Ann. § 83-41-211; Mont. Code Ann. § 33-22-111; Neb. Rev. Stat. § 44-513; Nev. Rev. Stat. Ann. § 695B.1975; N.H. Rev. Stat. Ann. § 419:5-a; N.M. Stat. Ann. § 59A-22-32.1; N.Y. Ins. Law § 4303; N.C. Gen. Stat. § 58-65-1; N.D. Cent. Code § 26.1-36-09; Okla. Stat. Ann. tit. 36, § 4508; Or. Rev. Stat. § 743.556; S.D. Codified Laws Ann. § 58-17-54; Tenn. Code Ann. § 56-7-2401; Tex. Ins. Code Ann. § 21.52; Utah Code Ann. § 31A-22-617; Vt. Stat. Ann. tit. 8, § 4089; Va. Code Ann. § 38.2-3408(A); Wis. Stat. Ann. § 632.87; Wyo. Stat. § 26-22-101.

B. Clinical Social Work Is A Distinct Profession With Rigorous Education And Training Requirements, State Licensing Or Certification, Peer Controls And Ethical Rules.

Clinical social workers are legally recognized professionals educated and trained in the diagnosis and treatment of emotional and mental illness. The psychotherapy services which they provide are the same as those rendered by psychiatrists and clinical psychologists.[13]

Social work education has evolved significantly from its earliest days. At present, 117 accredited master's level programs are offered by colleges and universities throughout the United States to prepare students for clinical social work practice and other career options. The typical clinical social worker has completed courses in cognitive, psychological and social development and major theoretical explanations of personality development, and has completed 900 hours of clinical training before graduating. While many of the 53 doctoral level programs are primarily oriented towards careers in research and teaching, there is a growing number of clinical doctorate programs that prepare post-master's degree students for advanced levels of clinical social work practice.[14]

In 1972, only eleven states and Puerto Rico licensed or certified social workers.[15] Today, all states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands have some form of regulation of clinical social work practice. These laws mandate minimum levels of education, experience, and supervision and may require an examination before an applicant may be licensed or certified for clinical social work practice.[16] In Illinois, for example, in order to become a licensed clinical social worker, as is the therapist in this case, an applicant must hold either a master's degree or a doctoral degree in social work from an approved academic program; must have completed either 3000 or 2000 hours, depending upon the level of academic degree, of post-degree supervisd clinical professional experience; and must pass an examination. *See* 225 ILCS 20/9.[17]

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[10] *See* Interstudy Center for Managed Care Research, *National Survey of Mental Health, Alcohol, and Drug Abuse Treatment in HMOs: 1989 Chartbook* (1992).

[11] *See* Committee on Therapy, Group for the Advancement of Psychiatry, *Psychotherapy in the Future* (1992).

[12] EAPs were first introduced to American corporations in the 1980s; by 1991, 45% of the full-time workforce was covered by an EAP. *See* Gibelman, *What Social Workers Do* 42 (1995).

[13] Studies on the therapeutic progress of patients treated by psychiatrists, clinical psychologists and clinical social workers have shown consistently that the three professions deliver essentially equivalent outcomes. *See* Giannetti & Wells, *Psychotherapeutic Outcome and Professional Affiliation*, 50 Soc. Serv. Rev. 32 (1985). A recent survey by the publisher of *Consumer Reports* found that patients were just as satisfied and reported similar progress whether they saw a social worker, psychologist or psychiatrist. *See Mental Health: Does Therapy Help?* *Consumer Reports*, Nov. 1995, at 734.

[14] *See* Frumkin & Lloyd, *Social Work Education, in 2 Encyclopedia* 2238, 2242. Clinical social workers also may attain certification in clinical practice, either the Diplomate in Clinical Social Work offered by *Amicus* NASW or the Board Certified Diplomate in Clinical Social Work offered by *Amicus* ABE. Over 20,000 clinical social workers have been certified.

[15] *See* American Association of State Social Work Boards, *Social Work Laws and Board Regulations: A State Comparison Study* (1995 ed.).

State laws uniformly require that social workers maintain the confidentiality of the information they receive from their patients.[18] Federal laws applicable in various clinical practice settings, such as substance abuse treatment programs, also mandate confidentiality.[19] Clinical

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[16] *See generally* Biggerstaff, *Licensing, Regulation and Certification, in* 2 *Encyclopedia* 1616-24.

[17] These requirements are comparable to those for licensed clinical psychologists. *See* 225 ILCS 15/10(3)(a) (doctoral degree in clinical, school or counseling psychology and two years of supervised experience at least one of which is an internship and one of which is postdoctoral). Psychiatrists, by contrast, are not licensed as such in any jurisdiction; an applicant for a license to practice medicine, including psychiatry, must only show that he or she has graduated from an accredited school of medicine and has completed at least one year of residency in any specialty. *See, e.g.*, D.C. Code Ann. § 2-3305.4(e).

[18] *See, e.g.*, Ariz. Rev. Stat. § 32-3283; Ark. Code Ann. § 17-39-107; Cal. Bus. & Prof. Code § 4992.3; Colo. Rev. Stat. Ann. § 12-43-214; Del. Code Ann. tit. 24, § 3913; D.C. Code Ann. §§ 6-2002 *et seq.*; Idaho Code § 622.10; 225 ILCS 20/16; Ind. Code Ann. § 25-23.6-6-1; La. Rev. Stat. Ann. § 37:2714; Me. Rev. Stat. Ann. tit. 32, § 7005; Mass. Gen. L. ch. 112, § 135B; Mich. Comp. Laws Ann. § 339.1610; Miss. Code Ann. § 73-53-17; Mo. Rev. Stat. § 337.636; Mont. Code Ann. § 37-22-401; N.J. Stat. Ann. § 45:15BB-13; N.M. Stat. Ann. § 61-31-24; N.Y. Civ. Prac. L. & R. 4508; Okla. Stat. Ann. tit. 59, § 1261.6; S.C. Code Ann. § 19-11-95; S.D. Codified Laws Ann. § 36-26-30; Tenn. Code Ann. § 63-23-107; W. Va. Code § 30-30-12; Wis. Stat. Ann. § 905.04.

[19] *See* 42 U.S.C. § 290dd-2, discussed *infra* pp. 18-19.

social workers are also bound by rules of professional conduct which require confidentiality of patient-related information.[20] These ethical codes require that patients be informed in advance of any limitations on confidentiality, and that informed and written consent be obtained before confidential information is revealed. Clinical social workers who violate these rules may be subject to both disciplinary action and liability for professional malpractice.[21]

II. MOST STATES AND CONGRESS NOW RECOGNIZE A PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS BETWEEN PSYCHOTHERAPY PATIENTS AND CLINICAL SOCIAL WORKERS.

Confidentiality of communications between therapists and their patients has long been recognized as an essential ingredient in the relationship of trust which is the cornerstone of all successful psychotherapy:

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare

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[20] The Code of Ethics of *Amicus* NASW, for example, provides that a "social worker should respect the privacy of clients and hold in confidence all information obtained in the course of professional service." Code of Ethics of the National Association of Social Workers, ¶ 2(H) (rev. 1993). The Code of Ethics of *Amicus* NFSCSW, which is enforced by member state societies, provides that "[t]he safeguarding of the client's right to privacy is a basic responsibility of the clinical social worker. Clinical social workers have a primary obligation to maintain the confidentiality of material that has been transmitted to them in any of their professional roles." National Federation of Societies for Clinical Social Work, Code of Ethics, Principle V (rev. May 1988). *See also* American Board of Examiners in Clinical Social Work, Code of Ethics, §§ II(2), III(3).

[21] *See, e.g.*, *Harley v. Druzba*, 565 N.Y.S. 2d 278 (N.Y. App. Div. 1991); *Cutter v. Brownbridge*, 228 Cal. Rptr. 545 (Cal. Ct. App. 1986); *Martino v. Family Service Agency of Adams County*, 445 N.E. 2d 6 (Ill. Ct. App. 1982).

> his entire self, his dreams, his fantasies, his sins and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.

Guttmacher & Weihofen, *Psychiatry and the Law* 272 (1952); *accord, Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955). The evolution of the reality and understanding of psychotherapeutic roles over the past quarter century has made clear that this need for confidentiality applies regardless of the professional discipline of the therapist. With several professions engaged in the diagnosis and treatment of mental health and emotional problems, often as members of multi-disciplinary teams, patients have no reason to focus on the particular credentials of the person whom they see, and have no basis for expecting that their communications with one category of therapists are protected from disclosure but those with another are not.

Reflecting this evolution, state legislatures and Congress have increasingly recognized the need to include communications with clinical social workers in statutory provisions protecting psychotherapist-patient communications from disclosure. These legislative developments are highly significant given Congress' mandate, in Rule 501 of the Federal Rules of Evidence, that the Court fashion evidentiary privileges "in the light of reason and experience."

1. Prior to 1972, very few states recognized an evidentiary privilege for communications between patients and clinical social workers.[22] Today, forty-four states and the District of Columbia have adopted such protections.[23]

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[22] *See* Bernstein, *Privileged Communications to the Social Worker*, 22 J. Nat'l Ass'n of Social Workers at 264, 265 (July 1977) (observing in 1977 that only two states, New York and California, had statutes creating a social worker-client privilege).

[23] *See* Ariz. Rev. Stat. Ann. § 32-3283 (privilege for communications with a certified behavioral health professional which is defined in § 32-3251 to include social workers); Ark. Code Ann. § 17-39-107 (creating a privilege for communications with licensed certified social workers); Cal. Evid. Code § 1012; Colo. Rev. Stat. Ann. § 13-90-107; Conn. Gen. Stat. Ann. § 52-146q (privilege for communications with persons certified as independent social workers); Del. Code Ann. tit. 24, § 3913 (privilege for communications with licensed clinical social workers); D.C. Code Ann. § 14-307 (privilege for communications with psysicians or mental health professionals, defined at § 6-2001 to include licensed social workers); Fla. Stat. Ann. § 90.503 (privilege for communications with psychotherapists, defined to include licensed clinical social workers); Ga. Code Ann. § 24-9-21 (privilege for communications with certain categories of licensed psychotherapists, including licensed clinical social workers); Idaho Code § 54.3213; 225 ILCS 20/16, 740 ILCS 110/10 (privilege for communication with a therapist); Ind. Code Ann. § 25-23.6-6-1 (privilege for communications with social worker or clinical social worker); Iowa Code Ann. § 622.10 (privilege extending to communications with mental health professionals generally); Kan. Stat. Ann. § 65-6315; Ky. R. Evid., Rule 507 (privilege for communications with psychotherapists, defined to include clinical social workers); La. Code Evid. Ann. art. 510 (privilege for communications with psychotherapists, including licensed mental health counselors and board certified social workers under the laws of any state or nation); Me. Rev. Stat. Ann. tit. 32, § 7005; Md. Code Ann., Cts. & Jud. Proc. § 9-121 (privilege for communications with licensed social worker); Mass. Gen. L. ch. 112, § 135A; Mich. Comp. Laws Ann. § 339.1610 (privilege for communications with social worker); Minn. Stat. Ann. § 595.02(g) (privilege for communications with licensed social worker engaged in psychological treatment); Miss. Code Ann. § 73-30-17, § 73-53-29; Mo. Rev. Stat. § 337.540, § 337.636; Mont. Code Ann. § 37-22-401 (privilege for communications with licensed social worker); Neb. Rev. Stat. § 71-1,335 (privilege for communications with mental health practitioners, defined to include licensed social workers); Nev. Rev. Stat. Ann. §§ 49.215-.254; N.H. Rev. Stat. Ann. § 330-A:19 (privilege for patient communications with certain certified practitioners, including certified clinical social workers), Rules of Evid., Rule 503; N.J. Stat. Ann. § 45:15BB-13 (privilege for communications with licensed or certified social worker); N.M. Stat. Ann.

Petitioner wrongly attempts to minimize the importance of these statutory protections by noting that there are some differences among them and some states permit exceptions in special circumstances. *Amici* do not dispute the need for careful delineation of the scope of the privilege and the inevitability of exceptions based on important public policies. But recognition of the need for some exceptions does not undermine the rationale of a psychotherapist-patient privilege including clinical social workers, and no such exception is applicable in this case.

The exclusion of criminal actions from the scope of the privilege in some states reflects the fact that law enforcement interests have always been recognized as having special urgency in our society and that criminal cases pose unique constitutional issues. It does not, however, negate those states' recognition of the privilege in other contexts.

Statutory exceptions for court-ordered examinations merely recognize that communications in such cases are not made for the purpose of treatment and that patients have no reasonable basis for expecting confidentiality where an examination takes place for the very purpose of making a determination in connection with a legal proceeding.[24] Similarly, patient-as-litigant exceptions merely illustrate the familiar principle, incorporated into virtually all recognized privileges, that a party who introduces an issue into litigation, such as his or her mental condition, may not prevent disclosure of all of the facts relevant to that issue.[25]

Certainly, the fact that some states allow or require disclosures by social workers and other mental health professionals of confidential information concerning the contemplation of a crime or a harmful act, or concerning child abuse or custody issues, *see* Pet. Br. at 34-35, 32, is not a basis for refusing to recognize the existence of a

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§ 61-31-24 (privilege for communications with licensed social worker); N.Y. Civ. Prac. L. & R. 4508 (privilege for communications with registered and certified social worker); N.C. Gen. Stat. § 8-53.7 (privilege for communications with certified social worker); Ohio Rev. Code Ann. § 2317.02(G) (privilege for communications with licensed social workers); Okla. Stat. Ann. tit. 59, § 1261; Or. Rev. Stat. § 40.250, Rule 504-4; R.I. Gen. Laws § 5-39.1-4; S.C. Code Ann. § 44-22-90; S.D. Codified Laws Ann. § 36-26-30 (privilege for communications with social worker); Tenn. Code Ann. § 63-23-107 (privilege for communications with licensed or certified social worker); Tex. R. Civ. Evid., Rule 510; Utah Code Ann. § 58-60-144, Utah R. Evid. 506; Vt. R. Evid. 503 (privilege for communications with mental health professional, defined to include social workers); Va. Code Ann. § 8.01-400.2 (privilege for communications with licensed clinical social worker); W. Va. Code § 30-30-12 (privilege for communications with licensed social workers); Wis. Stat. Ann. § 905.04 (privilege for communications with licensed social workers); Wyo. Stat. § 33-38-109.

Six states do not recognize a statutory privilege applicable to clinical social workers in a litigation context, although these states recognize related privileges. *See* Ala. Code § 34-8A-21 (placing confidential communications between a client and a licensed professional counselor or certified counselor associate in the same category as attorney-client privilege); Ala. R. Evid. 503A (West Supp. 1995) (eff. Jan. 1, 1996) (same); Alaska Stat. § 08.95.900(a) (providing privilege for social workers but creating exception for discovery in connection with litigation); Haw. Rev. Stat. § 626-1 (silent); N.D. Cent. Code § 31-01-06.3 (privilege for communications with addiction counselor); 23 Pa. Cons. Stat. § 6116 (privilege for communications with domestic violence counselor) and 42 Pa. Cons. Stat. § 5945.1 (privilege for communications with sexual assault counselor); Wash. Rev. Code Ann. § 18.19.180 (privilege for counselors which includes clinical social workers but with exception for subpoenaed evidence).

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[24] *See, e.g., State v. Post*, 826 P.2d 172, 182, *amended*, 837 P.2d 599 (Wash. 1992) (en banc); *In re Henderson*, 630 P.2d 944 (Wash. Ct. App. 1981); *Commonwealth v. Lamb*, 311 N.E.2d 47 (Mass. 1974); *Massey v. State*, 177 S.E.2d 79 (Ga. 1970), *cert. denied*, 401 U.S. 964 (1971).

[25] *See, e.g., United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1044 (E.D.N.Y. 1976) (Weinstein, J.), *aff'd*, 556 F. 2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977); *Peisach v. Antuna*, 539 So. 2d 544 (Fla. Dist. Ct. App. 1989); *Critchlow v. Critchlow*, 347 So. 2d 453 (Fla. Dist. Ct. App. 1977).

psychotherapist-patient privilege in general and its applicability to this case. Statutes imposing a duty on mental health providers to disclose information concerning potentially dangerous patients affect only a small portion of the situations in which psychotherapy is provided. The existence of a similar limited exception in the rules governing attorney-client confidentiality has not led to abandonment of that privilege.[26] And particular concerns about child welfare issues do not undermine the need for a psychotherapist-patient privilege in other contexts.[27]

The relatively minor variations in, and exceptions from, these state laws do not support exclusion of clinical social workers from a psychotherapist-patient privilege; rather they indicate clearly the ability of the courts to fashion, under Rule 501, a workable privilege sensitive to the competing interests presented in particular situations.

2. Congress has also recognized the need for confidentiality in communications between clinical social workers and their patients. Section 333 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, Pub. L. No. 91-616, and section 408 of the Drug Abuse, Prevention, Treatment, and Rehabilitation Act of 1972, Pub. L. No. 92-255, established broad rules of confidentiality with respect

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[26] *See, e.g., United States v. Zolin*, 491 U.S. 554 (1989).

[27] Moreover, while creating a duty of disclosure in these limited situations may be justified by overriding concerns for the safety of others, it has not been without cost in its effect on therapy. *See, e.g.*, Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 Stan. L. Rev. 165, 182-89 (1978). *Cf.* Carstensen, *The Evolving Duty of Mental Health Professionals to Third Parties*, 17 Int'l J. L. & Psychiatry 1, 20-22 (1994). Where statements are disclosed by psychotherapists pursuant to their duty to protect third parties or pursuant to child abuse reporting laws, it may still be appropriate to recognize a psychotherapist-patient privilege in legal proceedings arising after the disclosure. *Cf. People v. Clark*, 789 P.2d 127, 150 (Cal.), *cert. denied*, 498 U.S. 973 (1990).

to the identity, diagnosis, prognosis or treatment of patients in programs or activities for substance abuse treatment which are conducted, regulated, or directly or indirectly assisted by any department or agency of the United States. *See* 42 U.S.C. § 290dd-2, superseding 42 U.S.C. §§ 290dd-3 and 290ee-3. Congress has enacted a similar provision with respect to treatment afforded by the Department of Veterans Affairs, *see* 38 U.S.C. § 7332, and has directed that the same rules of confidentiality apply to programs for the treatment of alcohol abuse and alcoholism among employees of the federal government. *See* 5 U.S.C. § 7362(b).

While these provisions allow disclosure of confidential information if authorized by an appropriate order of a court, courts are directed to weigh the "injury to the patient, to the physician-patient relationship, and to the treatment services" in determining whether disclosure should be ordered. *See* 42 U.S.C. § 290dd-2(b)(2)(C). Regulations make clear that any other disclosure is forbidden in any civil, criminal, administrative or legislative proceedings conducted by any federal, state or local authority, *see* 42 C.F.R. § 2.13(a), and that confidentiality must be maintained regardless of the professional discipline to which the mental health provider belongs. *See* 42 C.F.R. § 2.11 ("treatment" defined as "the management and care of a patient suffering from alcohol or drug abuse, a condition which is identified as having been caused by that abuse, or both, in order to reduce or eliminate the adverse effects upon the patient"). Courts have given these provisions a broad reach consistent with their protective purpose. *See United States v. Eide*, 875 F.2d 1429, 1434-37 (9th Cir. 1989); *United States v. Graham*, 548 F.2d 1302, 1314 (8th Cir. 1977).

III. RECOGNITION OF A PRIVILEGE IN THIS CASE IS CONSISTENT WITH THE PHILOSOPHY OF RULE 501 AND THIS COURT'S PRIOR DECISIONS.

A. Recognition Of A Psychotherapist-Patient Privilege Including Clinical Social Workers Is Consistent With The Purpose And History Of Rule 501.

Rule 501 of the Federal Rules of Evidence requires courts to address the question of privilege "in the light of reason and experience." *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). This Court has previously recognized that, in "the evolutionary development of testimonial privileges," *Trammel v. United States*, 445 U.S. 40, 47 (1980), courts should not "adhere . . . to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change." *Id.* at 48.

Evolution in the delivery of mental health services was recognized in the pre-1972 development of proposed Rule 504 defining a psychotherapist-patient privilege. While the medical profession had historically taken the position that psychotherapy should only be provided by medical doctors,[28] the Advisory Committee also included clinical psychologists within the proposed rule in recognition of their then-growing role in the delivery of psychotherapy. Moreover, while the Advisory Committee's first draft of Rule 504 applied only to medical doctors who devote "a substantial portion of [their] time to the practice of psychiatry," the final version of the proposed rule was expanded to include general practitioners who devote "all or a part" of their time to psychiatry, a change described by the Reporter for the Advisory Committee as reflecting the Committee's determination "to stress the particular activity of the psychotherapist at the time," rather than the credentials of the persons providing the psychotherapy.[29] Extension of the psychotherapist-patient privilege to include clinical social workers merely recognizes the continued evolution of psychotherapy and understanding of their roles as providers.[30]

The absence of clinical social workers from the definition of "psychotherapist" in proposed Rule 504 reflected the undeveloped legal recognition of clinical social workers as providers of mental health services at the time of the Advisory Committee's deliberations.[31] A majority of the states did not then provide for licensure or certification of clinical social workers,[32] and there was statutory recognition of a privilege for communications between patients and social workers in only a handful of jurisdictions.[33] The principal issue which occupied the Advisory Committee in its consideration of proposed Rule 504 was whether the Rules should include a broad doctor-patient privilege reaching all forms of medical treatment. *See, e.g.*, Memorandum from Edward W. Cleary Re: Policy Aspects of Physician-Patient Privilege, *reprinted in* 1 House Hearings 557-59. After the Committee decided to limit the proposed privilege to the delivery of psychotherapy, it turned to whether the privilege should attach only to psychiatrists who practice psychotherapy on a full-time basis, as was originally proposed in the Committee's 1969 draft, or whether the privilege should apply to the treatment of mental and emotional problems by general medical practitioners, as in the final recommendation. *See* 25 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5521 (1989 ed.). There is no evidence that the Advisory Committee rejected the inclusion of clinical social workers on policy or any other grounds.[34] *See id.* § 5525 at 190.

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[28] The American Medical Association sent a letter to a member of the Advisory Committee indicating its position that psychotherapy "should be administered by or under the supervision of a qualified doctor of medicine," but stating that "since psychotherapy is allowed to be administered by others under the laws of some states, it seems . . . that there is the same need for confidentiality for anyone authorized by law to practice psychotherapy." Letter from Richard P. Bergen to J.E. Simpson *reprinted in* 1 *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 565 (1973) ("House Hearings").

[29] *See* Statement of Edward W. Cleary, 1 House Hearings 94.

[30] One relatively early study found that those qualifying for the privilege under the narrow definition in proposed Rule 504 would include only 16% of those receiving treatment for mental illness. *See* Comment, *The Psychotherapist Privilege: Are Some Patients More Privileged Than Others?*, 10 Pac. L.J. 801, 804 (1979). This percentage must be even smaller today.

[31] The limited recognition of the professional work of clinical social workers stemmed largely from the historic position of clinical social workers in public agencies and institutions where they worked alongside psychiatrists and psychologists. *See* Taube, *Staffing of Mental Health Facilities: United States 1974* at 7 (Nat'l Inst. of Mental Health, Dep't of Health, Education and Welfare, Series B, No. 8) (1974). Not only has the ratio of social workers to psychiatrists and psychologists in institutions increased significantly since the early 1970s, but clinical social workers have also entered independent private practice in increasing numbers. *See* Strom, *Social Workers in Private Practice: An Update*, 22 Clinical Soc. Work. J. 73, 88 (Spring 1994).

[32] *See* 1 House Hearings 478 (only 11 states and Puerto Rico had adopted social work practice statutes). In contrast, by 1977 all

The Advisory Committee's omission of social workers from its definition of psychotherapists was raised during the hearings in the House of Representatives on the Proposed Rules of Evidence. *See, e.g.*, 1 House Hearings 174, 196-97, 452, 458-59, 460-63, 475-81; 2 House

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50 states and the District of Columbia granted licensure or certification to psychologists. *See* U.S. Department of Health and Human Services, National Institute of Mental Health, *Mental Health, United States, 1990* at 199 (1990).

[33] *See supra* note 22.

[34] Thus, in his testimony before Congress, the Reporter for the Advisory Committee, Prof. Edward Cleary, did not even comment on the limited definition of non-medical professionals who could claim the privilege. *See* 1 House Hearings 94; *see also id.* at 554 (written response by Prof. Cleary to comments made during testimony).

Hearings 215. After the House elected not to enumerate specific privileges of any kind in the Rules, the scope of proposed Rule 504 received little attention from witnesses in the Senate.[35] *See, e.g., Hearings on Federal Rules of Evidence Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 356-57 (1974) (Senate Judiciary Committee Staff Memorandum); *but see id.* at 280 (statement of American Psychiatric Association), 382 (letter from Council for the Advancement of Psychological Professions and Services). The legislative history makes clear that Congress' substitution of Rule 501 for proposed Rule 504 was intended to permit, not to hamper, judicial development of a federal law of privilege, including a psychotherapist-patient privilege:

> It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, . . . or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. Rep. No. 1277, 93d Cong., 2d Sess. 4 (1974). Thus, the legislative history fully supports adoption of a privilege for communications between clinical social workers and their patients in the light of reason and contemporary experience.[36]

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[35] Petitioner's characterization of the legislative history as indicating "Congressional hostility toward a privilege for social workers," Pet. Br. at 39, overstates the import of a single, isolated comment which does not indicate how Congress would have decided if the issue of defining a separate privilege for psychotherapists had gone forward.

[36] In *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990), the Court stated that it is "reluctant to recognize a privilege in an area where it appears that Congress had considered the

B. Recognition Of A Privilege In This Case Is Consistent With The Court's Prior Decisions In That The Privilege Will Not Interfere With The Enforcement Of Federal Criminal Laws Or Significantly Impede The Truth-seeking Function Of The Courts In Civil Cases.

With only two exceptions,[37] all of the cases in which this Court has refused to recognize testimonial privileges under Rule 501 or on other grounds have involved "the need for probative evidence in the administration of criminal justice." *Trammel v. United States,* 445 U.S. at 51. *See also United States v. Arthur Young & Co.*, 465 U.S. 805 (1984); *United States v. Gillock,* 445 U.S. 360 (1980); *United States v. Nixon,* 418 U.S. 683 (1974); *Couch v. United States,* 409 U.S. 322 (1973); *Gravel v. United States,* 408 U.S. 606 (1972); *Branzburg v. Hayes,* 408 U.S. 665 (1972). In each of these cases, the societal interest in the enforcement of our criminal laws has overridden the competing interests in nondisclosure of information. As the Court stated in *Gravel v. United States,* "[w]e cannot carry a judicially fashioned privilege

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relevant competing concerns but has not provided the privilege itself." The Court was not referring to Congress' consideration of the Proposed Rules of Evidence, however, but to its independent consideration of separate legislation bearing on the issue of confidentiality in the area under review. Similarly, in *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984), the Court refused to recognize an accountant's work product privilege because Congress had not included such a protection in the statute authorizing the Internal Revenue Service to seek the records in issue.

[37] The first exception is *Herbert v. Lando,* 441 U.S. 153 (1979), which involved an action for defamation in which a claim of privilege was raised under the First Amendment for editorial deliberations. As discussed below, the privilege sought here has less consequence for the administration of civil justice than the privilege rejected by the Court in *Herbert.* The second case presenting the privilege issue in a civil context is *University of Pennsylvania v. EEOC, supra,* a case decided primarily on the basis of the legislative history of the applicable enforcement statute.

so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute." 408 U.S. at 627. Also, in criminal cases, societal interests in nondisclosure of confidential information may compete with defendants' rights to a fair trial, including the Sixth Amendment right of confrontation.[38] And when the privilege issue arises in the context of a criminal investigation, the veil of secrecy surrounding grand jury proceedings offers protection against abuse of the information. *See In re Zuniga,* 714 F.2d 632, 642 (6th Cir.), *cert. denied,* 464 U.S. 983 (1983). This case does not involve a criminal investigation or prosecution; nor is the issue of a psychotherapist-patient privilege likely to arise primarily in the context of criminal actions.[39]

It is true, as Petitioner contends, Pet. Br at 38, that cases involving civil enforcement of the civil rights laws also involve issues of national importance. But this Court has distinguished section 1983 cases from cases involving federal criminal laws when it comes to balancing competing societal interests. *E.g., United States v. Gillock*, 445 U.S. at 371-73. This Court has often ruled that state and local officials are entitled to absolute or qualified immunity from liability in civil suits brought under section 1983, *see, e.g., Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951), while acknowledging that these officials are not immune from federal criminal liability for the same conduct. *E.g., Scheuer v. Rhodes*, 416 U.S. at 237. The Court has also made clear that the policies underlying section 1983 do not require the admission of unreliable hearsay evidence, *see Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 616-17 (1974), and it is beyond doubt that the attorney-client and other recognized privileges apply fully in section 1983 actions notwithstanding the strong federal interest in enforcing the civil rights laws.

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[38] Since this is a civil action, the Sixth Amendment right of confrontation is not implicated, as it would be in a criminal case. *See In re Doe,* 964 F.2d 1325, 1328 (2d Cir. 1992); *United States v. Lindstrom,* 698 F.2d 1154, 1159-60 (11th Cir. 1983); *see also Pennsylvania v. Ritchie,* 480 U.S. 39 (1987); *Davis v. Alaska,* 415 U.S. 308 (1974).

[39] As this and other cases demonstrate, the admissibility of psychotherapist-patient communications frequently arises in a civil context. *See, e.g., Hancock v. Hobbs,* 967 F.2d 462 (11th Cir. 1992) (claim under 42 U.S.C. § 1983 for false arrest and unreasonable force); *Dixon v. City of Lawton, Oklahoma,* 898 F.2d 1443, 1451 (10th Cir. 1990) (§ 1983 claim for shooting by police officers); *Slakan v. Porter,* 737 F.2d 368 (4th Cir. 1984), *cert. denied,* 470 U.S. 1035 (1985) (§ 1983 claim by prisoner); *Flora v. Hamilton,* 81 F.R.D. 576 (M.D.N.C. 1978) (§ 1983 claim for termination from public employment); *Lora v. Board of Education of City of New York,* 74 F.R.D. 565 (E.D.N.Y. 1977) (§ 1983 action alleging racial discrimination in the assignment of children to special schools for the maladjusted and disturbed).

In most instances, as here, recognition of a privilege for communications with clinical social workers will not interfere with the truth-seeking function of the federal courts in civil rights or other civil cases. Nondisclosure of such communications will ordinarily not "plac[e] beyond the plaintiff's reach a range of direct evidence relevant to proving . . . elements that are critical to [the plaintiff's case]," *Herbert v. Lando*, 441 U.S. at 169, because information disclosed by a patient to a therapist regarding external events rarely will be the only available evidence of those events.[40] If a "smoking gun" exists, it is

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[40] Petitioner does not argue that testimony about the psychotherapy sessions in this case was necessary to provide direct evidence of any element of the claim; she argues only that such evidence was necessary to impeach the testimony of the individual defendant, Officer Redmond, through a number of different trial techniques. Petitioner had numerous other ways to test the credi-

most unlikely to be found in such communications. *See University of Pennsylvania v. EEOC*, 493 U.S. at 193. Even where the issue is the patient's prior state of mind, other testimony will frequently be available;[41] and, if the patient herself puts her state of mind in issue, she cannot complain if the court allows an exception to the privilege as necessary for a full and fair hearing. *See Dixon v. City of Lawton, Oklahoma*, 898 F.2d 1443, 1450-51 (10th Cir. 1990) (relying on proposed Rule 504(d)(3)).

Information covered by the privilege may also be unreliable in many cases, especially where therapy has followed immediately after a traumatic episode. Therapists inquire into external events for the purpose of uncovering the emotional effects of those events, not to obtain a complete report of what actually transpired. These emotions may color what the patient recalls or does not recall, as well as how the events are reported and recorded. Furthermore, it is an unfortunate fact that the need for mental health care services carries considerable social stigma. Thus, testimony concerning communications made in therapy may often be unduly prejudicial as well as unreliable.

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bility of Officer Redmond's testimony, however. The need for impeachment testimony has not been deemed sufficient to allow testimony concerning communications between witnesses and lawyers or between witnesses and clergy, although testimony concerning such communications could serve the same purposes at trial if it were allowed. Moreover, if a party may open up the effect of psychotherapy in order to impeach a witness's testimony, may not the opposing party offer expert testimony to contradict the theory of undue influence suggested by the questions? Such a scenario would divert juries and judges from their essential tasks in any civil action of determining what happened and whether it was justified, to determining the effects of psychotherapy on a witness's subsequent recall of events—an inquiry which is at best fraught with difficulty and risk of prejudice.

[41] *See, e.g., United States v. Barrett*, 766 F.2d 609, 615-16 (1st Cir.), *cert. denied*, 474 U.S. 923 (1985).

Under a qualified psychotherapist-patient privilege such as *amici* urge, the limited value of testimony concerning communications made in therapy would cause it to be excluded in most cases. However, such evidence could still be admitted in special categories of cases where there is an exceptional need. As the Court of Appeals correctly found, this is not such a case.[42]

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[42] Petitioner argues that recognition of a privilege is not necessary because federal courts have discretion to protect confidential information in the psychotherapeutic relationship. Pet. Br. at 40-42. This argument misperceives the rule adopted by the Court of Appeals as an absolute privilege under which evidence concerning all communications between psychotherapists and patients would inexorably be barred. The Court of Appeals was not required to adopt such an absolute rule in order to resolve the issues in this case and it did not do so. The case on which Petitioner principally relies on this point, *In re Doe*, 964 F.2d 1325 (2d Cir. 1992), expressly "recognized the existence of a psychotherapist-patient privilege" (at 1328), while holding that the unique issues of that criminal case justified an *in camera* balancing of interests. Petitioner's argument amounts to a concession that a psychotherapist-patient privilege needs to be recognized in order to provide a framework for the close scrutiny and balancing of interests which Petitioner urges.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeals recognizing, under Rule 501, a testimonial privilege for confidential communications between individuals and their clinical social workers during the course of psychotherapy.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, AS SPECIAL ADMINISTRATOR
FOR RICKY ALLEN, SR., DECEASED, PETITIONER,

v.

MARYLU REDMOND, HOFFMAN ESTATES POLICE OFFICER,
AND VILLAGE OF HOFFMAN ESTATES, ILLINOIS,
RESPONDENTS.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF OF THE MENNINGER FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a psychotherapist-patient privilege exists under Federal Rule of Evidence 501.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-266

CARRIE JAFFEE, AS SPECIAL ADMINISTRATOR
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v.

MARYLU REDMOND, HOFFMAN ESTATES POLICE OFFICER,
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RESPONDENTS.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF OF THE MENNINGER FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENTS[*]

INTEREST OF THE AMICUS CURIAE

The Menninger Foundation is a Kansas not-for-profit corporation which owns and operates the Menninger Clinic in Topeka, Kansas. The Menninger Clinic ("Menninger") was founded in 1925 and is now one of the nation's foremost psychiatric hospitals.[1] Menninger provides a complete continuum of care to patients from all over the country, ranging from out-patient evaluations to in-patient hospitalization, and offers treatment for virtually every form of mental illness. Each patient at Menninger is cared for by a "treatment team" led by a psychiatrist. Other members of the "core treatment team" include a psychiatric social worker, a clinical psychologist, a registered nurse with advanced training in psychiatric nursing, and an activity therapist. All members of the team provide care directly to the patient.

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[*] Consents to the filing of this brief have been lodged with the Clerk.

The Court of Appeals has confirmed what psychotherapists at Menninger have known from the beginning: in order to perform effective psychotherapy, clinicians must be able to assure their patients of the confidentiality of their relationship and, in so doing, establish a relationship built on trust. Although there may be limits to the confidentiality of this relationship, the fundamental presumption of confidentiality is essential to the successful treatment and cure of mental illness.

Menninger has created an attentive, therapeutic and nurturing environment for its patients and staff. This environment depends entirely upon the trust built between Menninger staff and patients. Without the psychotherapist-patient privilege recognized by the Court of Appeals in this case, that trust would be endangered and the important work of Menninger and other psychiatric hospitals would be put at risk. Accordingly, the amicus has a direct interest in the outcome of this case because it will determine the threshold issue of whether or not a therapist-patient privilege exists under federal law. It is essential to the amicus that federal law recognize the confidentiality of communications between psychotherapists and patients.

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[1] In its national survey of psychiatrists, U.S. News & World Report (July 24, 1995) ranked the Menninger Clinic the best psychiatric hospital in the United States.

SUMMARY OF ARGUMENT

This Court should protect the confidentiality of mental health communications by recognizing a psychotherapist-patient privilege. Patients in psychotherapy confide the most intimate details of their lives and their innermost thoughts to psychotherapists. Without a promise that these communications will be held in confidence, patients either will not seek psychotherapy or the therapy process will be irreparably damaged.

Federal Rule of Evidence 501 provides that privileges in federal question cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Reason and experience strongly support a psychotherapist-patient privilege. Federal law already recognizes the importance of maintaining the confidentiality of mental health communications. Proposed Rule 504, legislative reports, relevant legislation and Executive Department regulations all support a psychotherapist-patient privilege. All fifty states and the District of Columbia protect mental health communications. Moreover, traditional concepts of common law privacy support the privilege. Finally, the benefits of the privilege (and the costs of not adopting it) greatly outweigh any inconvenience to litigants.

This Court should affirm the Court of Appeals and recognize the psychotherapist-patient privilege.

ARGUMENT

I. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IS CRITICAL TO THE SUCCESS OF PSYCHOTHERAPY AND FURTHERS IMPORTANT SOCIETAL GOALS.

A. The Confidential Basis of Communications Between Psychotherapist and Patient.

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and they cannot get help except on that condition. * * * It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.[2]

The relationship between psychotherapist and patient is unlike any other dynamic between two people.[3] The patient reveals more than objective fact; he reveals who he is at the core. That is not an easy task for anyone. It requires courage, commitment, confidence and, most importantly, trust in the therapist who hears the patient's revelations.

The patient's relationship to a therapist is not unlike the priest-penitent relationship. The penitent offers what is most deeply kept inside him, what burdens his conscience. The penitent offers these intimate and confidential thoughts because he believes the priest will keep that communication with the trust of God. Of course, the penitent is protected by the seal of confession and thus knows that what he says will never be revealed. A religious confession without the seal is a self-accusation waiting to be spread to the world.

Likewise, the psychotherapist-patient relationship exists to reveal something most intimate, as painful as self-accusation of sin, namely mental anguish and fear. Few patients would reveal absolutely everything about themselves without assurance that what they say will not be repeated.

Even Sigmund Freud conceived of psychoanalysis[4] as a secular form of confession:

> [The patient] is to tell us not only what he can say authentically and willingly, what will give him relief like a confession, but everything else as well that his self observation yields him, everything that comes into his head, even if it is *disagreeable* for him to say it, even if it seems *unimportant* or actually *nonsensical*.[5]

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[2] Guttmacher & Weihofen, *Psychiatry and the Law* 272 (1952), quoted in *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955).

[3] Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 185 (1960).

[4] Psychoanalysis is a psychotherapeutic technique for diagnosing and treating mental and emotional disorders through ascertaining and analyzing the facts of the patient's mental life. *Dorland's Medical Dictionary, Shorter Edition* 567 (1980).

[5] Freud, *An Outline of Psychoanalysis*, in *Standard Edition of the Complete Psychological Works of Sigmund Freud* 141 (1964) (emphasis in original), quoted in Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. Rev. 893, 896 (1982).

B. Psychotherapy Without the Privilege.

The psychotherapist-patient relationship is based on trust and confidence.[6] Without trust and confidence, a chill would be cast upon the relationship between therapist and patient. Thus, without the protection of a privilege, fewer people will seek therapy.[7] As explained by prominent psychologist David C. Clark[8] in a letter to your amicus:

> Empirical studies of epidemiological trends in the United States consistently document that most persons with major psychiatric disorders and most persons with problems do *not* choose to see a mental health professional for help—this reluctance is related to social stigma, real and perceived expense, uncertainty about the usefulness of mental health services, fear of disclosure, and an acute sense of privacy. It is clear that even *fewer* people in need of help would seek mental health services if they knew or believed that patient-therapist communications were not privileged.

The fear of public disclosure is substantial. The patient risks psychological harm from public revelations of mental disorders.[9] In addition, mental illness carries a social stigma. Commentators routinely note that "people view mental illness as more embarrassing than physical illness."[10] Government surveys have concluded that "the public generally fears and dislikes the mentally ill and believes them to be unpredictable and untrustworthy."[11] So strong is the public's fear of stigma that many people choose to pay their own therapy bills rather than submit them to insurers whose records may be available to an employer.[12] The fear of stigma causes psychological harm. As one expert put it, "subjecting a psychiatric patient to fear of public disclosure and stigmatization is a form of patient abuse."[13]

It is not in society's interest to place painful barriers in the way of effective therapy. If people who need help do not seek therapy or go about it in a guarded, ineffective way, they may fail to address psychological problems that ultimately could render them dangerous. Although it is impossi-

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[6] Lamkin, *Should Psychotherapist-Patient Privilege Be Recognized?*, 18 Am. J. Trial Advoc. 721 (1995).

[7] Slovenko, *Psychiatry and a Second Look*, *supra* n.3, at 187.

[8] Professor of psychiatry and psychology at Rush Medical College (one of the nation's leading medical schools and teaching hospitals) and director of the Center for Suicide Research and Prevention at Rush-Presbyterian-St. Luke's Medical Center.

[9] Shuman & Weiner, *The Psychotherapist-Patient Privilege* 112 (1987).

[10] Shuman & Weiner, *The Privilege Study*, *supra* n.5 at 897, citing Guttmacher & Weihofen, *Psychiatry and the Law*, *supra* n.2 at 271; *Developments in the Law, Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1193, 1200 (1974).

[11] Cerveny & Kent, *Evidence Law: The Psychotherapist-Patient Privilege in Federal Courts*, 59 Notre Dame L. Rev. 791, 798 (1984), citing H.E.W., *Public Opinions and Attitudes About Mental Health* (Gov't Printing Office 1963).

[12] Domb, *I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J.L. & Health 209, 222 (1990/91), citing Note, *The Case for a Federal Psychotherapist-Patient Privilege That Protects Patient Identity*, 1985 Duke L.J. 1217, 1228 (1985).

[13] Slovenko, *Accountability and Abuse of Confidentiality in the Practice of Psychiatry*, 2 Int'l J. L. & Psychiatry 431, 442 (1979).

ble to quantify this risk, common sense suggests that society will be better served if those needing mental health services are encouraged to obtain it, rather than be frightened away from professionals.[14] Dr. Clark confirms the dangers of placing barriers in the way of mental health treatment:

> The psychopathology that afflicts and impairs so many psychiatric and psychological patients only serves to make them more reserved, withdrawn, distrustful, and suspicious. When a patient can be reassured that his/her communication with the therapist is protected by law, so that no third party can have access to that information, many (not all) patients will talk frankly with their therapist about concerns, symptoms, and history. In the absence of confidentiality safeguards, therapists simply cannot assess, diagnose, and treat patients adequately. This is particularly true in the area of suicide risk assessment and treatment, my own area of expertise. *Patients will not be frank about their suicidal or homicidal thoughts with the therapist unless that therapist can offer legal reassurance that all communications will be safeguarded as confidential up to the point where a person must be protected from dangerous behavior*. (Emphasis added).

The Court of Appeals also recognized this:

> The need, and demand, for counseling services has skyrocketed during the past several years due to the rapid spread of violence and crime throughout our nation. * * * The recognition of a psychotherapist/patient privilege can only serve to encourage troubled individuals, as well as those who witness, participate in, and are intimately affected by acts of violence in today's stressful, crime ridden, homicidal environment, to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors.

Jaffee v. Redmond, 51 F.3d 1346, 1355 (7th Cir.), cert. granted, 116 S.Ct. 334 (1995).

Although much of the empirical research on the chilling effects of denying a privilege to psychotherapist-patient communications has been inconclusive,[15] *all* of the leading studies conclude that the confidentiality of the psychotherapist-patient relationship is important to the patient.

For example, petitioner cites a 1982 work in which Daniel Shuman and Dr. Myron Weiner surveyed Texas citizens with respect to the population's attitudes toward psychotherapy under the state's new psychotherapist-patient privilege law. See Pet. Br. at 28. Although Shuman and Weiner concluded that their "group of patients very clearly viewed confidentiality as a requisite for a trust necessary for

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[14] It is also logical to infer that the more the mentally ill are able to take advantage of treatment opportunities, the more likely they will become productive members of society.

[15] *E.g.*, Taube & Elwork, *Researching the Effects of Confidentiality Law on Patients' Self-Disclosures*, 21 Prof. Psych.: Research and Practice 72 (1990). This study purports to show that the existence of a privilege does not affect patients' willingness to disclose information, but Taube and Elwork admit that their findings are severely limited and *cannot* be used to support any legislative action for or against the psychotherapist-patient privilege. See also Nowell & Spruill, *If It's Not Absolutely Confidential, Will Information Be Disclosed?*, 24 Prof. Psych.: Research and Practice 367 (1993). Nowell and Spruill likewise caution that their findings are inconclusive as to the general population because their sampling consisted solely of college students in an introductory psychology course.

therapy,"[16] they also found that "when asked on what they relied most heavily to guarantee the privacy of their communication with the therapist, patients stated that they relied much more strongly on the therapist's ethics than on a statutory guarantee of privilege."[17] Yet they also found that "most of the patients were unaware of the privilege,"[18] leading one to question whether the sample group simply lacked a legal understanding of the differences between "privilege law" and professional ethical obligations. Most significantly, the sample population believed that comments to a psychotherapist *would* remain confidential and undisclosed. In the end, this study supports the argument that, absent trust and confidentiality, patients will be more guarded and less forthcoming with therapists.[19]

Other studies confirm that people will be more likely to seek therapy or be more open in therapy if they can expect confidentiality. One study revealed that of 108 randomly selected "potential patients," "42 percent of the sample reported they would be less likely to be open in therapy than

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[16] *The Privilege Study*, *supra* n.5 at 926.

[17] *Ibid.*

[18] *Id.* at 925.

[19] Moreover, Shuman and Weiner reached their conclusions after an examination of *insurance* claims. From insurance data, they concluded that "no surge of new patient or psychotherapy sessions followed in the first full year of the privilege's enactment." *Ibid.* This is not surprising, however, in light of the fact that many people pay for their own therapy rather than submit claims to insurers. *Ibid.* Indeed, those most concerned about confidentiality are unlikely to disclose such treatment to their insurers.

if their communications would be absolutely protected."[20] Another study surveyed teachers and school administrators, 83 percent of whom said they did not want to reveal to state authorities whether they had ever sought mental health treatment.[21] In addition, a study of college students showed strong support for the confidentiality of psychotherapist-patient communications.[22]

Similarly, a study of the effect of asking about mental health treatment on state bar applications found that "students anticipating bar examinations and the extensive inquiry that accompanies them may avoid professional mental health consultation for fear of 'damaging' their record and delaying their admission while an investigation of fitness ensues."[23]

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[20] Appelbaum, Kapen, Walters, Lidz, & Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psychiatry L. 109, 110 (1984), citing Comment, *Functional Overlap between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1126 (1962).

[21] *Ibid.*, citing Rosen, *Do Potential Community Mental Health Center Clients Want Privacy?*, unpublished manuscript, cited in Noll & Rosen, *Privacy, Confidentiality, and Informed Consent in Psychotherapy*, in *Psychiatric Patient Rights and Patient Advocacy: Issues and Evidence* (1982).

[22] Stevens & Shearer, *An Assessment of Nonprofessionals' View on Confidentiality*, unpublished manuscript, cited in Noll & Rosen, *Privacy, Confidentiality, and Informed Consent* in *Psychotherapy, Psychiatric Patient Rights and Patient Advocacy: Issues and Evidence* (1982).

[23] Edson, *Mental Health Status Inquiries On Bar Applications: Overbroad and Intrusive*, 43 U. Kan. L. Rev. 869, 880 (1995), citing Maher & Blum, *A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants*, 23 Ind. L. Rev. 821, 826-827 (1990).

See also *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430, 437-38 (E.D. Va. 1995).

The success of psychotherapy depends on the patient's full disclosure; without it the therapy is ineffective. As the Group for the Advancement of Psychiatry found in 1960, the psychotherapist's "capacity to help his patients is completely dependent upon their willingness to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patient of confidentiality and, indeed privileged communication."[24] In short, "A privilege for those receiving psychotherapy is necessary if the psychiatric profession is to fulfill its medical responsibility to its patients."[25]

As explained by Dr. W. Walter Menninger[26] in a statement to your amicus:

> In the absence of the guaranty of confidentiality, the basic trust in the psychotherapist's relationship with the patient is compromised. This basic trust is essential for the psychotherapeutic process to go forward.

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[24] Cerveny & Kent, *Evidence Law*, *supra* n.11 at 797, quoting 4 Group for the Advancement of Psychiatry, *Reports and Symposiums*, No. 45, at 95 (1960).

[25] Slovenko, *Psychiatry and a Second Look*, *supra* n.3 at 199.

[26] President and Chief Executive Officer of the Menninger Foundation and Clinic, Professor and former Dean of the Karl Menninger School of Psychiatry and Mental Health Services, Clinical Professor of Psychiatry at Kansas University School of Medicine and Senior Faculty Member of the Topeka Institute for Psychoanalysis.

II. IN LIGHT OF REASON AND EXPERIENCE, THIS COURT SHOULD RECOGNIZE THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

A. Federal Law Supports the Recognition of a Psychotherapist-Patient Privilege.

Federal Rule of Evidence 501 states in relevant part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

By adopting Rule 501 instead of rules delineating specific, enumerated privileges, "Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis, and to leave the door open to change." *Trammel v. United States*, 445 U.S. 40, 47 (1980) (internal quotation marks and citation omitted). See also *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.25 (1984) ("Indeed, Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them. Congressional failure to codify this privilege is therefore irrelevant to our inquiry") (citations omitted).[27]

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[27] Accordingly, because they tend to rely exclusively on the absence of a clear privilege in earlier periods of the common law, the decisions of the courts of appeals that decline to recognize a psychotherapist-patient privilege apply the wrong legal standard. See generally *In re Doe*, 964 F.2d 1325, 1328 (continued...)

That *all fifty states*, *Congress* and the *Executive Branch* have endorsed a mental health professional-patient privilege amply demonstrates that "reason and experience" support such a privilege. These branches of the government have implemented confidentiality restrictions applicable not only to psychiatrists and psychologists, but also to the therapists and social workers who are so indispensable to modern mental health care. Indeed, Congress and the Executive Branch have expressed the view that confidential communications in the professional mental health treatment setting are as worthy of protection as those between attorneys and clients or between clergy and penitents.

At the outset, this Court has explained that the attorney-client, physician-patient and clergy-penitent privileges

> are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.

Trammel, 445 U.S. at 51.

These considerations are equally applicable to the relationship between mental health care professionals and patients. Proposed Federal Rule of Evidence 504, adopted by the Judicial Conference of the United States,[28] stated in part:

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[27](...continued)
(2d Cir. 1992) ("The cases rejecting the privilege are not helpful, however, because they are founded on the view that Rule 501 limits the development of privileges to those recognized by the common law, a position that we regard as contrary to the teaching of *Trammel* 'not to freeze the law of privilege'"). See also *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir.) (refusing recognition of psychotherapist-patient privilege "[b]ecause our discretion under Rule 501 is limited to the development of privileges extant in the common law"), cert. denied sub nom. *Doe v. United States*, 493 U.S. 906 (1989); *United States v. Corona*, 849 F.2d 562, 566-67 (11th Cir. 1988) (stating that "evidentiary privileges in federal criminal cases are governed by common law unless modified or expanded by an Act of Congress, the Constitution or rule prescribed by the Supreme Court"), cert. denied, 489 U.S. 1084 (1989).

[28] That recommendation furnishes substantial evidence that the psychotherapist-patient privilege merits recognition under Rule 501. See *United States v. Gillock*, 445 U.S. 360, 367 (1980) (noting that "[n]either the Advisory Committee, the Judicial Conference, nor this Court saw fit, however, to provide [in the proposed Rules] the [state legislator] privilege sought by Gillock"). Although Congress ultimately elected not to accept proposed Rule 504, it specifically stated that its decision was *not a rejection of the privilege*:

> It should be clearly understood that, in approving this general rule as to privileges [that is, Rule 501], the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. Rep. No. 1277, 93d Cong., 2d Sess. 13 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7059. See also *Weber Aircraft Corp.*, 465 U.S. at 803 n.25; *Trammel*, 445 U.S. at 47.

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

In explaining the rationale for proposed Rule 504, the Judicial Conference Advisory Committee observed that a psychiatrist's ability to help patients

> is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure * * * patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule * * *, there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client.

Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (ellipses in original), quoting Group for the Advancement of Psychiatry, *supra* n.24 at 92.

Proposed Rule 504(a)(2), however, contained a narrow definition of "psychotherapist" which effectively included only physicians and licensed psychologists. Refusal to apply the privilege to other qualified mental health professionals is not supported by principle,[29] fails to account for the realities of modern mental health care and is contrary to the judgments expressed by Congress, the executive branch and numerous states. See 25 Wright & Graham, *Federal Practice and Procedure* § 5525, at 187 (1989 & Supp. 1995) (noting arbitrariness of Rule 504(a)(2)'s formulation because, among other reasons, a highly trained professional would be excluded "simply because the state in which she practiced did not have a licensing scheme for psychologists or because she was employed in a public institution and was exempt from the licensing requirement") (footnotes omitted); 23 Wright & Graham, *supra*, § 5429, at 817-20 (recommending that the privilege encompass social workers delivering mental health care).[30]

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[29] A number of courts have equated the psychotherapist-patient relationship with the physician-patient relationship, but they are not the same. *In re Grand Jury Proceedings*, 867 F.2d

(continued...)

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[29](...continued)

562 (9th Cir.), cert. denied, 493 U.S. 906 (1989); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988), cert. denied, 489 U.S. 1084 (1976). A person in therapy reports what he feels, not just what he knows. Much of what a physician does in the healing arts can be accomplished successfully even if the patient withholds some information or exhibits a modicum of self-denial. A psychotherapist needs full disclosure even if the patient's thoughts are irrational or seemingly unconnected to the present circumstances.

[30] The definition contained in Proposed Rule 504(a)(2) was imported from one state statute that was the result of parochial political battles fought long ago: "The restricted definition of 'psychotherapist' in Rejected Rule 504(a)(2) is taken from the seminal Connecticut statute. That statute appears to have been based less on principle than on the drafter's appraisal of the politics of the time in Connecticut. It is difficult to see any policy reason for the restrictions." 25 Wright & Graham, *supra*, § 5525, at 176.

For this and other reasons, one pair of respected commentators has urged that the definition of "psychotherapist" under Proposed Rule 504(a)(2) "is inadequate to the purposes

(continued...)

B. Congress and the Executive Branch Have Expressly Protected Mental Health Communications.

Congress has recognized the need for mental health confidentiality. *E.g.*, the Mental Health Systems Act of 1980, Pub. L. No. 96-398, 94 Stat. 1565, codified as amended at 42 U.S.C. § 9401 *et seq.* (1995). The Bill of Rights in that Act explicitly confirms the patient's "right to confidentiality" of mental health records. 42 U.S.C. § 9501(1)(H). Such records also are exempt from the Freedom of Information Act's disclosure requirements (Pub. L. No. 89-554, 80 Stat. 383, codified as amended at 5 U.S.C. § 552(b)(6)) and subject to the Privacy Act of 1974's mandate that federal agencies promulgate special rules restricting their disclosure (Pub. L. No. 93-579, 88 Stat. 1897, codified as amended at 5 U.S.C. §§ 552a(b), 552a(f)). See, *e.g.*, 20 C.F.R. § 401.105(e) (requiring confidentiality of information maintained by, *inter alia*, any "psychological" professional under Social Security contract); 45 C.F.R. § 1304.3-8(b) (Health and Human Services regulation requiring confidentiality of mental health care information).

In connection with the Mental Health Systems Act, Congress explained:

> The Committee recognizes the need to assure the confidentiality and privacy of the treatment relationship in the field of mental health. It is an accepted premise that the capacity of a mental health professional to help his or her patient is strongly related to the patient's willingness to talk freely and openly. That willingness is in turn often dependent on the patient's belief that his or her communications are confidential.
>
> The Committee realizes that it would be quite difficult to provide mental health treatment without being able to assure the patient of confidentiality, privacy, and indeed, *privileged communication*. The Committee believes that *the treatment relationship is comparable to that of a priest/penitent or lawyer/client*.
>
> Patients not only disclose the very depths of their consciousness, but also their unconscious fears, feelings and attitudes. The Committee believes that confidentiality is a sine qua non for successful mental health treatment. Without a secure environment in which patients can communicate with the confidence that they are free from others knowing what may be said, all of mental health care would be destroyed.

S. Rep. No. 712, 96th Cong., 2d Sess. 93 (1980), reprinted in 1980 U.S.C.C.A.N. 3372, 3460 (emphasis supplied).

Congress reiterated this judgment in the Protection and Advocacy for Mentally Ill Individuals Act of 1986, Pub. L. No. 99-319, 100 Stat. 478, codified as amended at 42 U.S.C. §§ 10801-10851. Congress restated the Bill of Rights that it had adopted in 1980, including the patient's "right to confidentiality" of mental health information. 42 U.S.C. § 10841(1)(H). The statute also requires that the confidentiality of patient information be maintained throughout mental health protection and advocacy systems. 42 U.S.C. §§ 10806(a). Congress broadly recognized the qualified mental health professionals who deliver care under the Act "to include mental health specialists who are licensed or certified by the state, or where no state licensure exists, possess national licensure or certification." S. Rep. No. 109,

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[30](...continued)
of the privilege and should not be used by courts in developing a common law privilege under Rule 501." *Id.* at 173-74. In fact, since Rule 504(a)(2) was proposed, Connecticut's privilege statute has been amended to include social workers. Conn. Gen. Stat. Ann. § 52-146(q).

99th Cong., 1st Sess. 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 1361, 1368-69.

Congress also has expressed the need for confidentiality in the treatment of alcohol and drug abuse, both of which are closely related to and often overlap with mental health care. A federal statute mandates the confidentiality of patient information pertaining to "substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States." 42 U.S.C. § 290dd-2(a). See also 42 C.F.R. §§ 2.3(b)(1), 2.13(a), 2.63 (restricting disclosure of substance abuse patient records, including in any "civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority").

Congress observed that "the strictest adherence" to such confidentiality provisions "is absolutely essential to the success of all drug abuse prevention programs. * * * Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome." H.R. Rep. 775, 92d Cong., 2d Sess., as reprinted in 1972 U.S.C.C.A.N. 2045, 2072. See also S. Rep. No. 1206, 94th Cong., 2d Sess. 116 (1976), reprinted in 1976 U.S.C.C.A.N. 6355, 6408 (explaining that confidentiality of substance abuse information is necessary because prior to such protection "large numbers of addicted veterans who might otherwise have sought VA treatment probably did not do so, for fear that the fact of their disability and confidential information revealed during treatment would be available for easy distribution and circulation").

C. Every State Recognizes the Psychotherapist-Patient Privilege.

Congress did not limit federal courts to those privileges that were recognized under English common law, but instead anticipated that federal courts would look to the common law as developed in the states. See Cerveny & Kent, *Evidence Law*, *supra* n.11 at 811. Indeed, this Court has considered "state privilege laws in determining whether to retain them in the federal system." *Gillock*, 445 U.S. at 368 n.8. See also *Jaffee*, 51 F.3d at 1356-57.[31] As petitioner concedes, *all fifty states and the District of Columbia have adopted a*

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[31] As the Court of Appeals observed (51 F.3d at 1356-57):

> [T]he law of privilege as developed by the states is not irrelevant as the Supreme Court "has taken note of state privilege laws in determining whether to retain them in the federal system." *United States v. Gillock*, 445 U.S. 360, 369 n.8, 100 S.Ct. 1185, 1191 n.8, 63 L.Ed.2d 454 (1980); see also *Memorial Hospital v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981) (quoting *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976)) ("'[a] strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy'"); *William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982) (federal courts are not precluded from "resort[ing] to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled"). The widespread recognition of the psychotherapist/patient privilege in all fifty states is strong evidence that "experience with [the privilege] has been favorable." *In re Doe*, 964 F.2d at 1328.

privilege for therapists and other mental health professionals.[32] Pet. Br. at 31. The District of Columbia and at least forty-two states expressly include a privilege for confidential communications to a social worker.[33] To be sure, the states have developed variations on the theme, but state law offers

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[32] See Ala. Code § 34-26-2; Alaska R. Evid. 504; Alaska Stat. § 08.86.200; Ariz. Rev. Stat. Ann. § 32-2085; Ark. R. Evid. 503; Cal. Evid. Code § 1010 *et seq.*; Colo. Rev. Stat. § 13-90-107(g); Conn. Gen. Stat. § 52-146c; D.C. Code Ann. § 14-307; Del. R. Evid. 503; Fla. Stat. Ann. § 90.503; Ga. Code § 24-9-21; Haw. R. Evid. 504.1; Idaho Code § 54-2314; 740 ILCS 110/1 *et seq.*; Ind. Code Ann. § 25-33-1-17; Iowa Code Ann. § 622.10; Kan. Stat. Ann. § 74-5323; Ky. R. Evid. 506, 507; Ky. Rev. Stat. § 421.215; La. Code Evid. Ann. Art. 510; La. Rev. Stat. Ann. § 13:3734, § 37:2363; Me. Rev. Stat. Ann. tit. 32, § 7005; Md. Code Ann. Cts. & Jud. Pro. § 9-109; Mass. Gen. Laws ch. 233, § 20B; Mich. Comp. Laws Ann. § 330.1750; Minn. Stat. § 595.02; Miss. Code Ann. § 73-31-29; Mo. Rev. Stat. Ann. § 337.055; Mont. Code Ann. § 26-1-807; Neb. Rev. Stat. § 27-504; Nev. Rev. Stat. § 49.215, *et seq.*; N.H. Rev. Stat. Ann. § 330-A:19; N.J. Stat. Ann. § 45:14B-28; N.M. Stat. Ann. §61-9-18; N.Y. Civ. Prac. L. & R. § 4507; N.C. Gen. Stat. § 8-53.3; N.D. R. Evid. 503; Ohio Rev. Code Ann. §§ 2317.02, 4732.19; Okla. Stat. Ann. tit. 12, § 2503; Or. Rev. Stat. § 40.230; 42 Pa. Cons. Stat. Ann. § 5944; R.I. Gen. Laws § 5-37.3-4, § 5-37.3-6; S.C. Code Ann. § 44-22-90; S.D. Codified Laws Ann. § 36-26-30; Tenn. Code Ann. § 24-1-207, § 63-11-213; Tex. R. Evid. 509; Tex. Rev. Civ. Stat. Ann. § 611.002; Utah R. Evid. 506; Utah Code Ann. § 58-60-102; Vt. R. Evid. 503; Vt. Stat. Ann. Tit. 12, § 1612; Va. Code § 8.01-400.2; Wash. Rev. Code Ann. § 18.8.110; W.Va. Code § 30-30-12; Wis. Stat. Ann. § 905.04; Wyo. Stat. Ann. § 33-27-113.

[33] Contrary to the petitioner's assertion, Utah *does* specifically protect communications to social workers. See Utah R. Evid. 506.

a resounding endorsement of the general principle that communications with a psychotherapist ought to be kept confidential and shielded from discovery.

Of course, as petitioner points out, there are exceptions and limitations to the therapist privilege under state law. Pet. Br. at 31-38. However, this not only confirms that such privileges exist to begin with, but also demonstrates that the states are in general agreement as to the scope of the privilege and its exceptions.

For example, all states allow or require the divulging of otherwise confidential mental health communications when necessary to prevent harm to the patient or third parties. See Comment, *The Beginning of the End for the Psychotherapist-Patient Privilege*, 60 U. Cin. L. Rev. 797 (Winter 1992); Levine, *A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y.L. Sch. J. Hum. Rts. 711 (1993).[34] Likewise, no state permits a litigant who puts his mental condition at issue to stand behind the therapist-patient privilege to bar discovery of therapy records which *the litigant* has made relevant to the action. See n.32, *supra*.

D. Common Law Rights to Privacy Support a Psychotherapist-Patient Privilege.

The special concern at common law to prevent disclosure of highly personal facts bolsters the conclusion that "reason and experience" warrant protection of communications between therapists and patients. This Court has recognized the common law privacy interest in "keeping personal facts away from the public eye" and in "the individual's control of information concerning his or her person." *United States Dep't of Justice v. Reporters Comm. for Freedom of*

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[34] Most states also permit or require reporting of past or intended child abuse. Levine, *A Therapeutic Jurisprudence*, *supra*.

the Press, 489 U.S. 749, 763, 769 (1989). See also *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (characterizing "the right to be let alone" as "the right most valued by civilized men"); Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890-1891) ("The common law secures to each individual the rights of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. * * * [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them"), quoted in *Reporters Comm. for Freedom of the Press*, 489 U.S. at 764 n.15.

Thus, for example, this Court has indicated that there are substantial individual privacy interests that weigh heavily against disclosure of patient prescription drug information (*Whalen v. Roe*, 429 U.S. 589, 605 (1977)) and criminal rap sheets (*Reporters Comm. for Freedom of the Press*, 489 U.S. at 771). This Court also has observed the individual's "interest in preserving the confidentiality of sensitive information" from psychological aptitude test results. *Detroit Edison Co. v. National Labor Relations Board*, 440 U.S. 301, 318 & n.16 (1979).

The privacy interests in communications between a patient and mental health professional are of at least an equal magnitude. Both federal and state law expressly limit the dissemination of such information. See *Reporters Comm. for Freedom of the Press*, 489 U.S. at 764-65 (finding support for privacy interest in federal statutes and regulations limiting disclosure); *Detroit Edison Co.*, 440 U.S. at 318 n.16 (same). There are few more personal, private and sensitive facts warranting protection from disclosure in our society than those relating to one's own mental health and emotional well-being. See, *e.g.*, *In re Doe*, 964 F.2d at 1328 (communications with psychotherapists often involve highly personal matters, the disclosure of which "would frequently be embarrassing to the point of mortification for the patient"); *Developments in the Law, Privileged Communications*, 98 Harv. L. Rev. 1530, 1544-47 (1985) ("Compelled disclosure of information communicated by a patient to a psychotherapist will therefore often threaten the privacy of the patient's most intimate thoughts").

E. The Psychotherapist-Patient Privilege Does Not Cause Undue Hardship or Injustice.

As shown in Section I, psychotherapy brings enormous benefits to society. It alleviates pain and suffering and may well make a violent world safer. Also, as shown in Section I, the benefits of psychotherapy may be lost if the confidentiality of the psychotherapeutic relationship is threatened. Weighed against this tragic loss is petitioner's hodge-podge of phantom harms. None of the asserted harms outweighs the value of the privilege.

First, petitioner fears that "[c]rucial evidence would be excluded" under "the broad privilege sought by respondents." Pet. Br. at 21.

Petitioner's arguments are directed against a strawman, depending on the premise that the Seventh Circuit adopted a rule of "absolute confidentiality" or "complete secrecy." Pet. Br. at 26-27. Nowhere did the Seventh Circuit so hold or even intimate. To the contrary, the Court of Appeals repeatedly stated that it was affording protection only to the confidential communications before it and was deferring comment on the privilege's scope and exceptions to future cases. *Jaffee*, 51 F.3d at 1357 ("However, we also note that the privilege we recognize in a case of this nature requires an assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests"); *ibid.* ("We decline to speculate as to what situations would call for the abrogation of this privilege. Instead, we confine our analysis to a factual situation of this nature"); *id.* at 1358 ("Based on the facts and circumstances presented in this record, we recognize the existence of the psychotherapist/patient privilege").[35]

In any event, this Court need not today delineate the full contours of the therapist-patient privilege. Like other privileges, the lower courts should develop its scope and exceptions on a case-by-case basis, in the concrete factual settings necessary to resolve such disputes properly. See *Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981). Thus, petitioner's suggestion that any recognition of the privilege automatically will foreclose certain areas of inquiry should not be credited. The federal courts are more than capable of evaluating the interests involved in particular factual settings. See, *e.g.*, *In re Zuniga*, 714 F.2d 632, 639-40 (6th Cir.) (weighing competing interests in determining whether specific information sought is protected under psychotherapist-patient privilege), cert. denied, 464 U.S. 983 (1983).

In addition, given the broad discretion of federal trial judges in passing on evidentiary issues, it is very unlikely that "crucial" evidence ever will be excluded. And even if some evidence *is* excluded, there is no reason to assume that it is more important for a litigant to have a particular piece of evidence—what a patient told a therapist—than for a patient to keep that same information confidential. Where the litigation does not itself arise from the therapy, it does no harm to prefer the value of confidential therapy over the value of discovering every last detail of a litigant's private thoughts and feelings. In this "information age," in which strangers know our addresses, telephone numbers, credit card balances, health status and buying preferences, it is more than appropriate to draw the line at psychotherapy—even with a social worker—as one of the last bastions of confidentiality. See *Trammel*, 455 U.S. at 51 (courts should recognize a privilege when it promotes sufficiently important interests to outweigh the need for probative evidence).

Moreover, the probative value of therapy communications is highly speculative. The statements patients make in therapy do not always correspond to reality. As noted above, Freud encouraged patients to say anything coming to mind, from the undesirable to the irrational. See Section I, *supra*. As Dr. Slovenko has pointed out, "[i]n psychotherapy, the patient reports whatever goes through his mind. Saying all is the desideratum."[36] The focus of psychotherapy is often to induce feelings or statements which the patient may not even realize he possesses or is capable of, so that "treatment is directed primarily toward the feelings and attitudes which are unacceptable to the patient and others."[37] Thus, what a psychiatric patient says is not always what he believes or what corresponds to reality, for frequently the statements "are not 'facts.' Psychic reality is not the same thing as actual reality."[38] This is hardly "crucial evidence."

F. Proposed Rule 504 Does Not Adequately Protect Confidential Mental Health Communications.

Recognizing the likelihood that this Court will adopt some form of psychotherapist-patient privilege, petitioner next urges that the privilege be limited to the text of proposed Rule 504. Pet. Br. at 39. This transparent attempt to "lose the battle but win the war" would not serve federal policy. First, as noted above, this Court need not adopt so rigid a rule. It makes more sense to allow the lower courts to flesh out the details, such as which kind of professional may engage in privileged therapy.

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[35] Moreover, all fifty states have recognized the privilege and managed to craft exceptions to ensure the fair administration of justice. There is no reason to expect any less of the federal judiciary. Cf. Pet. Br. at 40 (arguing in favor of allowing the trial court to exercise discretion).

[36] Slovenko, *Psychiatry and a Second Look*, *supra* n.3 at 186.

[37] *Id.* at 194.

[38] *Ibid.*

Second, proposed Rule 504 is limited to physicians and psychologists, but psychotherapists (whether or not they meet the requirements of Rule 504) deal with patients who require confidentiality. See Section I, *supra*. For instance, at Menninger, patients are treated by a "core treatment team," consisting not only of a psychiatrist and psychologist, but also of a psychiatric social worker, a registered nurse with advanced training in psychiatric nursing and an activity therapist. Petitioner's position would invade the confidentiality of the work of this team simply because of the participation of mental health professionals other than psychiatrists and psychologists.

Moreover, limiting the privilege to the confines of proposed rule 504 would effectively eviscerate it for a significant proportion of those in therapy. In today's "managed care" environment, plan sponsors strictly limit mental health resources, frequently requiring that patients see social workers and not psychiatrists or psychologists. See Wright & Graham, *supra*, § 5525, at 177 (citing study finding that 73% of those seeking treatment for mental illness were treated by social workers, nurses, and other unlicensed professionals). As a participant in managed care, Menninger has experienced this first-hand, and must respond by designing a treatment plan accordingly. Thus, for many insured Americans, a privilege limited to psychiatrists and psychologists is no privilege at all.

Indeed, in this case, Marylu Redmond sought counseling not from some itinerant clinical social worker, but from her employee assistance program ("EAP") at work. EAPs are common in today's workplace and succeed only because the employee is promised that the therapy will be provided in strict confidentiality. Menninger has been retained for a number of EAPs. The fact is that, mainly due to cost containment efforts, EAPs are staffed principally by social workers, not psychiatrists and psychologists. Workers who cannot afford private therapy should be able to seek assistance through their EAPs without fear of exposure. Viewed from another perspective, employers should be able to offer their employees access to confidential therapy through an EAP as a means to increase their productivity and well-being. Proposed Rule 504 does not accomplish this because social workers are the primary clinicians in EAPs.

Finally, the regime contemplated by proposed Rule 504 would add to the already large disparity in mental health care available to the wealthy and the poor. As noted above, insurance plans normally cover therapy only by a social worker. In many cases, employees will not be able to afford to "opt out" of the insurance plan's limitations. Thus, excluding social workers would accomplish nothing other than to create a double standard: wealthy patients who can afford psychiatrists and psychologists would be entitled to confidential therapy, while the poor and minorities, who often receive therapy from social work agencies, would have to bare their souls to any lawyer who serves a subpoena.

Reason and experience teach that social workers should not be excluded. The psychotherapist-patient privilege should be available to all patients and should be applied on a case-by-case basis by the lower courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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